No. 95-1065-CFX  Title: Paul Schenck and Dwight Saunders, Petitioners
v.
Pro-Choice Network of Western New York, et al.

Docketed: January 3, 1996  Court: United States Court of Appeals for the Second Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Dec 27 1995 | Petition for writ of certiorari filed. (Response due February 2, 1996) |
| | Jan 31 1996 | Brief of respondents Pro-Choice Network of Western New York, et al. in opposition filed. |
| | Feb 14 1996 | DISTRIBUTED. March 1, 1996 |
| | Feb 20 1996 | Reply brief of petitioners filed. |
| | Mar 11 1996 | REDISTRIBUTED. March 15, 1996 |
| | Mar 18 1996 | Petition GRANTED.<br>SET FOR ARGUMENT October 16, 1996.<br>********** |
| | Apr 11 1996 | Order extending time to file brief of petitioner on the merits until May 17, 1996. |
| | Apr 30 1996 | Joint appendix filed. |
| | May 14 1996 | Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae filed. |
| | May 14 1996 | Motion of Alan Ernest for leave to represent children unborn and born alive filed. |
| | May 15 1996 | Brief amicus curiae of Rutherford Institute filed. |
| | May 17 1996 | Brief of petitioners Paul Schenck and Dwight Saunders filed. |
| | May 17 1996 | Brief amicus curiae of Family Research Council filed. |
| | May 17 1996 | Brief amici curiae of American Civil Liberties Union Foundation of Florida, et al. filed. |
| | May 17 1996 | Brief amicus curiae of AFL-CIO filed. |
| | May 17 1996 | Brief amicus curiae of Liberty Counsel filed. |
| | May 17 1996 | Brief amicus curiae of Life Legal Defense Foundation filed. |
| | Jun 6 1996 | Order extending time to file brief of respondent on the merits until July 1, 1996. |
| | Jun 10 1996 | Motion of Legal Defense for Unborn Children for leave to file a brief as amicus curiae DENIED. |
| | Jun 10 1996 | Motion of Alan Ernest for leave to represent children unborn and born alive DENIED. |
| | Jun 25 1996 | Brief amici curiae of American Civil Liberties Union, et al. filed. |
| | Jun 27 1996 | Brief amici curiae of Connecticut, et al. filed. |
| | Jul 1 1996 | Brief of respondents Pro-Choice Network of Western New York, et al. filed. |
| | Jul 1 1996 | Brief amicus curiae of New York filed. |
| | Jul 1 1996 | Brief amici curiae of American Medical Women's Association, et al. filed. |
| | Jul 1 1996 | Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. |
| | Jul 1 1996 | Brief amicus curiae of City of Phoenix, Arizona filed. |
| | Jul 1 1996 | Brief amici curiae of Feminist Majority Foundation, et al. filed. |
| | Jul 1 1996 | Brief amicus curiae of United States filed. |
| | Jul 3 1996 | LODGING by respondents. Twenty (20) copies of September |

No. 95-1065-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | | 18, 1991 letter with drawings submitted to Judge Richard A. Arcara, United States District Court for the Western District of New York. |
| | Jul 16 1996 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| | Jul 26 1996 | Application (A96-70) an extension of time to file a reply brief on the merits, submitted to Justice Ginsburg. |
| | Jul 29 1996 | CIRCULATED. |
| | Jul 31 1996 | Application (A96-70) granted by Justice Ginsburg extending the time to file until August 8, 1996. |
| | Jul 31 1996 | Reply brief of petitioners Paul Schenck and Dwight Saunders filed. |
| | Aug 5 1996 | Record filed. |
| | Aug 20 1996 | Record filed. |
| | Sep 5 1996 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| | Oct 16 1996 | ARGUED. |

Supreme Court, U.S.
FILED

95 1065 DEC 27 1995

OFFICE OF THE CLERK

No. 95 -

IN THE
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1995

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REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK,
ET AL.,

Respondents,

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

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264 pp

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## QUESTIONS PRESENTED

1. In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), this Court replaced the "reasonable time, place and manner" analysis to be applied to injunctions with the more rigorous standard of "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) this Court required "precision of regulation" with regard to injunctive relief which burdens speech, protecting and separating peaceful speech from unprotected non-speech activities. Against this background the first question asked is:

   > Whether the en banc decision of the Second Circuit Court of Appeals upholding a provision of an injunction which prohibits all speech within overlapping fifteen foot floating no-speech zones (which create a fifteen foot no-speech bubble around the abortion clinic and all pedestrians and vehicles) on public sidewalks and streets outside abortion clinics is the most precise way to ensure access to the abortion clinic and promote public health and safety in the context of overwhelmingly peaceful demonstrations and a lack of any finding that a less restrictive injunction could not accomplish the same goals.

2. Again, in the context of the *Madsen* and *Claiborne* decisions above, and particularly the finding in *Madsen* of the unconstitutionality of no-approach zones as content based restrictions on free speech:

   > Whether the Second Circuit's en banc decision upholding the "cease and desist" provision in the

injunction below, based as it is on the dislike by a communicatee of the words being spoken by a communicator, is in conflict with this Court's decision in *Madsen* which held that the no-approach zone burdened more speech than necessary and further rejected content based restrictions on speech as a violation of the First Amendment to the United States Constitution.



## PARTIES

The Petitioners are as follows: Reverend Paul Schenck and Dwight Saunders.

The Petitioners were defendants in the District Court and appellants in the Court of Appeals. Reverend Paul Schenck and Dwight Saunders were the only appellants at the Court of Appeals.

The Respondents are as follows: Pro-Choice Network of Western New York, Buffalo GYN Women Services, Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D. The Respondents were each plaintiffs in the District Court and appellees in the Court of Appeals.

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No. 95 -

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REVEREND PAUL SCHENCK and
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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

## DECISIONS BELOW

By summons and complaint, the Respondents commenced an action in federal district court on September 24, 1990 seeking declaratory injunctive relief against planned social protest demonstrations at abortion clinics in the Buffalo area. By decision and order dated February 14, 1992 the district court issued a preliminary injunction which operated as a blanket ban on all speech on public sidewalks and streets, even peaceful non-threatening speech. That decision is published as *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Appendix E, pages



A-138 through A-186). An appeal was taken by Petitioners. On September 6, 1994 a panel of the Court of Appeals upheld all parts of the injunction ensuring access to the abortion clinic, but struck down two provisions of the injunction as violative of the free speech clause of the First Amendment, *inter alia*, a provision which established fifteen (15) foot "floating no-speech bubble zones" around the abortion clinic itself and each pedestrian and vehicle entering or leaving the abortion clinic and a second provision requiring protesters to cease and desist from unwanted speech at the sole discretion of the individual entering or leaving the abortion clinic. That decision is published as *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 67 F.3d 359 (2d. Cir. 1994). (hereafter "*Pro-Choice Original Panel*") (Appendix B, pages A-79 through A-115).

Respondents petitioned the Court of Appeals for a rehearing en banc, which was granted on December 27, 1994. On September 28, 1995, the en banc panel of the U.S. Court of Appeals for the Second Circuit reversed the earlier panel, finding that the blanket ban on speech on public sidewalks and streets was consistent with the First Amendment. That decision is published as *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d. Cir. 1995) (hereinafter "*Pro-Choice En Banc Panel*") (Appendix A, pages A-1 through A-78).

Following contempt proceedings in the district court, an appeal was taken. On May 26, 1993, a panel of the United States Court of Appeals for the Second Circuit issued an opinion which, although not reaching the merits, analyzed the contempts in the context of the floating bubble zones and the cease and desist provisions of the preliminary injunction. That decision is published at *Pro-Choice of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) (Appendix C, pages A-116 to A-133).

## JURISDICTION

The preliminary injunction of the United States District Court for the Western District of New York was entered February 14, 1992. The original panel decision of the United States Court of Appeals for the Second Circuit was decided on September 6, 1994. The Court of Appeals granted in banc consideration of two provisions of the injunction (which the original panel had struck down as violative of the First Amendment) on December 27, 1994. The en banc panel of the Court of Appeals issued its decision on September 28, 1995, reversing the earlier panel decision. This Court has jurisdiction, under 28 U.S.C. Section 1254(l) to review the judgment of the United States Court of Appeals sitting in banc.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution Amendment I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ".

## STATEMENT OF THE CASE

In this case the en banc panel of the Second Circuit has upheld a temporary injunction which (*inter alia*) forbids peaceful picketing, leafletting, and conversation by Petitioners on public sidewalks and rights of way.

Both dissenting opinions from the en banc decision state that the very foundation of the First Amendment, the public forum doctrine, is severely damaged by the en banc decision.

Judge Meskill states:

> Today thirteen of this court's judges give approval to an injunction which seriously infringes on the constitutional rights of freedom of speech and expression. . . .
>
> A careful examination of the entire record in this case should lead to one conclusion: the inclusion of both the buffer zone and the cease and desist provisions in the injunction fails the analysis enunciated in *Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Indeed, as I read the record, what was done by appellants--the picketing, the leafletting, the voicing of protest--was done in the finest tradition of the First Amendment, hardly justifying so sweeping an abridgment of free speech. Regrettably, the majority today concludes otherwise, *embarking this Court on an ill-fated journey whose destination is the dilution of the public forum doctrine, the very core of the First Amendment*. To such a result I cannot agree.



*Pro-Choice En Banc Panel*, 677 F.3d at 399 (A-48 to A-49) (Meskill, J., dissenting) (emphasis added).

Judge Altimari states:

> I am saddened by our holding today. Because I believe that the majority of the Court has departed from a proud tradition of zealously protecting the most fundamental of the freedoms bequeathed to us by our forefathers--the right to speak freely, on a sidewalk or street corner--I respectfully dissent. . . . Despite the preferred status that has been conferred upon pure speech

> as exercised in traditional public fora, both majorities today disregard their solemn duties to jealously guard that speech. . . . *I remain persuaded, however, that the protesters tread only upon the sidewalks and streets--a protected setting for the free exercise of persuasive speech--and not upon the constitutional rights of those individuals seeking access to the clinics. . . . In this case, the restrained speech occurred on streets and sidewalks outside health facilities. Yet the Court today chooses to disregard the very foundation upon which our First Amendment freedoms are built.* It is axiomatic that all public streets are held in the public trust and are properly considered traditional public fora.

*Pro-Choice En Banc Panel*, 67 F.3d at 409-410 (A-72 to A-75). (Altimari, J., dissenting) (emphasis added) (quotations and citations ommitted).

This, in short, is a free speech case.

This is *not* a "rescue" case. There were no pro-life sit-ins or blockades at the plaintiff abortion facilities before the preliminary injunction issued. The district court stated at the outset of its opinion:

> Prior to the preliminary injunction hearing, defendants stipulated that the physical "blockade" type of "rescue" demonstration may be enjoined. Thus, the evidence adduced at the preliminary injunction hearing centered on constructive "blockade" type of demonstration and "sidewalk counseling". Commendably, there have been no physical "blockades" since



> the Court issued the TRO.

799 F. Supp. at 1424 n.5 (Appendix E at A-146).

The principal question in this case is whether the en banc panel erred by suspending the Petitioners' right to engage in speech -- even completely peaceful speech -- on public sidewalks, alleys, and streets.

As a matter of evidence and constitutional law, the answer is clear: the two disputed provisions of the temporary injunction in this case cannot stand. The injunction unconstitutionally restricts and discriminates against Petitioners' free speech rights.

The extreme nature of the distortion to settled First Amendment jurisprudence by the en banc panel was aptly described by Judge Altimari:

> The "floating bubble zone" established by the district court, and now reaffirmed by the court, is an *unprecedented and unwarranted incursion of freedom of speech*. . . . To my mind, it cannot be said that a prohibition on signs within fifteen feet of an unwilling listener "burden[s] no more speech than necessary." Nor, I think, can it be said that vesting unwilling listeners--even those "en route to a destination,"--with the absolute power to banish speech to a distance of fifteen feet from a moving target burdens no more speech than necessary. The Court's ability to construe these provisions such that they pass constitutional muster puts me in mind of Lewis Carroll's classic passage:
>
> "When I use a word," Humpty

> Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master--that's all."

*Alice Through the Looking Glass*, Lewis Carroll (1872).

* * *

> The new majorities, however, have sacrificed not only our proper role--to remand a concededly flawed injunction for correction by the district court--but also, in the bargain, the "preferred position" of the First Amendment, see *Beuharnais v. Illinois*, 343 U.S. 250, 285, 72 S.Ct. 725, 745, 96 L.Ed. 919 (1952) (Black, J., dissenting). The question now is "which is to be master--that's all." . . . Like Alice, I am befuddled by the whimsy effected today. I dissent.

*Pro-Choice En Banc Panel*, 67 F.3d at 410-411 (A-73, A-76 to A-77 (Altimari, J., dissenting) (emphasis added).

This Court should grant this petition for certiorari and correct this manifest attack on the core of the First Amendment: the protection of unpopular and despised speech in the traditional public forum of public sidewalks and streets.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451,



462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

The most important reason to grant this petition is to restrain the manifestly improper and expansive view of "public health and safety" which ambiates the *Pro-Choice En Banc Panel's* rationale. Without correction by this Court, this overly broad police power will metastasize to banish all unpopular speech and expression from our public sidewalks and streets, which challenge us as a society to change.

Judge Winters' majority opinion[1] states as follows:

> Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. . . . Moreover, the power of televised pictures of coercive or obstructionist conduct to chill others is considerable and an independent reason motivating some protestors to go beyond peaceful persuasion. . . . *Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect*

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[1] Although Judge Oakes' opinion is labeled the majority, Judge Winter's opinion also garnered a majority of the en banc panel.

> *on some members of society need not be ignored.* The timid have a right to go about their business, and it is *no embarrassment* for a federal court to say so.

*Pro-Choice En Banc Panel* 67 F.3d at 96 (A-41 - A-42) (Winters, J., concurring) (emphasis added).

The Winters Majority has enthusiastically rejected the settled First Amendment jurisprudence of this Court reflected in cases such as *NAACP v. Clairborne Hardware*, 458 U.S. 886 (1982). If the Winters Majority is correct, then their new constitutional right "not to be hassled in public" will swiftly encroach upon union picketlines, gay rights activists and all other anti-establishment protesters who "hassle" the American people by challenging the status quo. "Don't rock the boat" will be the new core of the First Amendment.

### A. Course of Proceedings and Statement of Facts

By summons and complaint, the plaintiffs commenced an action in federal district court on September 24, 1990 seeking declaratory injunctive relief against planned social protest demonstrations at abortion clinics in the Buffalo area. The district court issued temporary restraining orders and later had extensive preliminary injunction hearings.

At the beginning of the preliminary injunction hearing, the defendants filed "Defendants' Stipulations." (Appendix D: A-134 to A-137). The defendants' stipulations made it clear for purposes of the preliminary injunction that the defendants would stipulate to a preliminary injunction against blockades and mass trespass. However, the plaintiffs proceeded to request and the district court granted an injunction prohibiting a broad variety of free speech activities of the defendants including what is commonly known as sidewalk counseling, picketing,



demonstrating and an affirmative order compelling the defendants to discourage others from engaging in any of the enjoined activities.

This appeal does involve two aspects of the preliminary injunction that seek to enjoin pure speech activities (1) such as setting up fifteen (15) foot floating bubble zones around the abortion clinic and all pedestrians and vehicles to be free to demonstrations; and (2) such as allowing sidewalk counseling by only two individuals but if the person they are attempting to speak to declines to speak them, then they must immediately move back fifteen (15) feet and immediately stop any expressive activities.

## REASONS FOR GRANTING THE WRIT

### I. The Decisions By ThE District Court And En Banc Court Of Appeals For The Second Circuit Conflict With All Existing First Amendment Constitutional Jurisprudence Regarding The Rights Of Speech On Public Sidewalks And Streets Throughout The United States And Can Only Be Justified If The Right To An Abortion Trumps The Right Of Peaceful Speech Under The First Amendment To The U.S. Constitution

This petition for a writ of certiorari presents significant and compelling constitutional issues. Never before in the history of American jurisprudence has a federal court upheld an injunction prohibiting peaceful, non-threatening speech on a public sidewalk outside a business facility *in absence of a showing that access to the facility is impeded*. While *Madsen, infra*, permitted the imposition of an injunction which created a thirty-six foot buffer zone around the entrance door to abortion facilities, the *Pro-Choice En Banc Panel* upheld an injunction

placing no-speech zones around not just the entrance to an abortion clinic, but also around any person or vehicle seeking access to or leaving such facilities. *These floating no-speech zones are unprecedented in American Constitutional jurisprudence*. They prohibit even the silent holding of a placard within fifteen feet of persons or vehicles "seeking access to or leaving such facilities."[2] The record in this case even notes that

---

[2] The misuse of the floating no-speech zone and the content-based cease-and-desist provisions dampen regular demonstration speech activities. This was illustrated in their first post en banc decision application. On November 28, 1995, the Honorable Richard Arcara, United States District Judge for the Western District of New York, signed an order to show cause to enforce these provisions of the February 14, 1992 injunction against two female Pro-Life advocates. The order relied solely upon affidavits of persons employed by the Womenservices abortion clinic of Buffalo and the clinic's attorney. These employee-affiants identified and described the conduct of the two alleged contemnors, Phyllis Walker and Eva Boldt, both "regular demonstrators" at the clinic. The court's order directed these two women to appear and to answer criminal contempt charges and fines of $20,000 each.

Each percipient witness affidavit submitted requires examination:

1. Lawrence E. Payne, M.D., a physician at the clinic, complained that Ms. Boldt "held a large sign approximately one foot in front and across [his] driver side window" as his car was stopped in the process of exiting the clinic driveway. Dr. Payne opened his "driver side door, stepped out and told Boldt 'Get away -- someone's going to get killed.'" He then returned to his car and left, "safely turn[ing] onto Main Street."
2. Melinda DuBois, a counseling supervisor at the clinic, was interrupted in her conversation as she attempted to speak with a security guard in the doorway alcove of the clinic. Ms. Boldt's and Ms. Walker's shouting of slogans outside the entrance "made it difficult to communicate" with the guard.

(continued...)



---

[2](...continued)

3. Richard Walkner, the security guard speaking to Ms. DuBois above, noted that Ms. Boldt and Ms. Walker shouted their slogans even though Ms. DuBois did not "indicate any willingness to communicate" with them. Mr. Walkner also recounted an incident where Ms. Boldt and Ms. Walker had approached and followed alongside a young woman and her male escort as they were walking toward the entranceway of the clinic. He observed, from a distance, how Mrs. Boldt's and Ms. Walker's shouting of slogans was met by the male escort's own shouting of obscenities back in their direction.
4. Anna Thibodeau, a clinic employee, threatened Ms. Boldt with harassment prosecution for "speaking" to her twice as she left the clinic. Ms. Boldt's attempted communications occurred during Ms. Thibodeau's walk to her car.
5. Marilynn Buckham, executive director at the clinic, complained of an incident when Ms. Walker "was standing in the apron of the driveway" and "shouting." Ms. Walker's presence caused Ms. Buckham to stop and then to proceed into the drive at a reduced rate of speed. According to Ms. Buckham, Ms. Boldt, standing further up the driveway, was then able to "touch" the slowly moving vehicle and to scream into the front seat from the passenger side of the car. In another incident, Ms. Buckham said that Ms. Boldt and Ms. Walker had "lean[ed] into the vestibule area from outside the clinic, shouting for more than one minute." This incident occurred shortly after two young girls who had entered the building were "well within the building and not any longer within sight of persons standing outside."

(*See generally*, APPENDIX F: A-187 to A-220).

Despite what appear to be minor inconveniences caused by typical speech and protest activities, i.e., shouting slogans and holding placards, Ms. Boldt and Ms. Walker, acting alone, are blamed by several of the affiants for consequences out of proportion to their behavior. Examples are: Dr. Payne, who blamed the momentary holding of a placard for making him late to surgery at a

(continued...)

one person was held in contempt for violating this injunction many blocks away from the clinic.

While *Madsen*, held unconstitutional a provision in an injunction that required defendants within three hundred feet of an abortion clinic to "refrain from physically approaching any person seeking services of the clinic (unless such person indicates a desire to communicate)" 114 S.Ct. at 2529, the *Pro-Choice En Banc Panel*, upheld a provision of an injunction prohibiting speech to any individual or group of persons who do not want to be spoken to. In *Madsen*, this Court ruled illegal the prohibition of speech based upon its adverse emotional impact on a communicatee. The *Pro-Choice En Banc Panel* upheld an injunction prohibiting speech based upon the adverse emotional impact upon a communicatee.

In *Madsen*, this Court required precision of regulation by federal courts in issuing injunctions which burden speech, requiring a showing that less restrictive means of censorship either had failed to work in the past or were impracticable. In *Pro-Choice*, there was no prior injunction which attempted to serve the governmental purposes asserted by the lower court

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[2](...continued)

city hospital in Buffalo; Ms. DuBois, who claimed that her difficulty in communicating to the security guard, caused by shouts outside, "delayed the performance of [her] duties"; and Ms. Buckham, who faulted the presence of one person "standing" in the apron area of the clinic drive for exposing the right flank of her car to traffic as she turned off from the street. More importantly, the District Court's reaction, to censure these typical speech and protest activities and to call Ms. Boldt and Ms. Walker to answer criminal charges, appears to have encouraged this over-reaction. It is interesting here that the "communicatees'" expressed responses, even though threatening, hostile and intimidating, are effectively immunized from injunctive review. The end-result is that clinic employees may speak freely while the First Amendment protection of the Pro-Life message is abrogated.



which was less restrictive of speech. Instead of first issuing a narrow injunction like that in *Madsen*, the lower court immediately went into its draconian prohibition mode of setting up floating no-speech zones, and prohibiting speech to any communicatee who expressed her desire not to receive such speech. See *Pro-Choice*, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Appendix E at A-138 to A-186).

In short, the *Pro-Choice En Banc Panel* flatly and arrogantly in its haste to jump aboard the abortion bandwagon, flouts all constitutional precedent. In order to arrive at its result, the majority opinion misstates much of the record, *see* 67 F.3d at 400 (2d Cir. 1994) (A-49) (Meskill, J., dissenting), and like Humpty Dumpty seeks to make its distortion of law and fact reality. *See* 67 F.3d at 410-411 (A-77 to A-78) (Altimari, J., dissenting).

If this decision is allowed to stand, then no protest on a public sidewalk or street is any longer protected by the First Amendment of the Federal Constitution. We will have stepped back over two hundred years in the development of civil rights, and arguably reverted to a standard of law that predated the Magna Carta. It should be noted that the Magna Carta did permit dissent and protest. Under the *Pro-Choice En Banc Panel's* decision, we revert to a time when sheer brutal power ruled. President John F. Kennedy once noted that those who would make protest impossible make violence inevitable.

Finally, this Court has previously observed in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993) that this nation is divided on the issue of abortion: that people of good faith argue both sides of this debate. By shutting off one side of this debate, the *Pro-Choice En Banc Panel* says to a large group of Americans that their voice does not count. The *Pro-Choice En Banc Panel* decision is so at odds with this Court's prior decisions, especially *NAACP v. Claiborne Hardware*, 458

U.S. 886 (1982), where extremely violent activity was mixed with pure speech and this Court held that precision of regulation meant that while proscribing the violent activities, this Court would protect the nonviolent speech. Pro-Life advocates can only be left with the distinct impression that there are two laws in this country. One that applies to Pro-Life speech and the other that applies to citizens expressing any other ideas. This dichotomy has never before been condoned by this Court and Petitioners pray that this Court does not begin with this case.

### A. The Free Floating, Unlimited, Overlapping, Moving No-Speech Zones In The Context Of Non-Violent, Peaceful Speech, Burden More Speech Than Necessary To Serve The Governmental Interests In This Case

As this Court recently noted in the *Madsen*, supra, decision, injunctive restrictions on speech must be narrowly tailored to burden no more speech than necessary. Time, place, and manner restrictions pass scrutiny under the First Amendment only when they are "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), this Court held that the "standard time, place, and manner analysis is not sufficiently rigorous" for evaluating injunctive restrictions on speech, *id.* at 2525 (emphasis added), and that a speech-restrictive injunction is unconstitutional unless the restrictions "burden no more speech than *necessary* to serve a significant government interest," *id.* at 2525 (emphasis added). The *Madsen* Court explained, *id.* at 2526, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968). In *Carroll*,



this Court elaborated upon the governing constitutional standard:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpoint objective permitted by constitutional mandate and the essential needs of public order . . . in other words, the order must be tailored as precisely as possible to the exact needs of the case.

393 U.S. at 183-84. *See Madsen*, 114 S.Ct. at 2526.[6] Applying the *Madsen/Carroll* content-neutral injunction test in the context of the record below, the *Pro-Choice Original Panel* struck down both the bubble zone and the cease and desist provision "because they burden more speech than necessary" to accomplish the government's "pin-pointed" objective of providing access to abortion facilities.

The validity of legislative time, place, and manner regulations is not dependant on the particular facts of a case, so long as the regulations are neutrally and generally applied. This standard allows the government wider latitude in proscribing activity targeted by the legislature. Injunctions regulating speech, on the other hand, are neither neutral nor generally applicable. Hence, they are constitutionally required to be fact sensitive, to "burden no more speech than necessary to serve a significant interest." *Madsen*, 114 S.Ct. at 2525.

Injunctions affecting speech warrant more rigorous

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[6] An injunction which is content-based, of course, would be a prior restraint subject to the strictest scrutiny. *Id.* at 2524 n.2. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). To the extent the injunction is justified on the grounds that Petitioners' communication of its message causes anxiety and stress, the injunction would be content-based.

scrutiny than legislative enactments because they are ready tools of censorship. *See Madsen*, 114 S.Ct. at 2524. Because they are issued by a single judge, often carry heavy penalties for their violation, and target particular individuals or groups, "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do generally applicable ordinances." *Id.* at 2524; *cf. United Mine Workers of America v. Bagwell*, 114 S.Ct. 2552, 2563 (1994) ("[w]here a single judge, rather than a legislature, declares a particular sanction . . . such deference is less appropriate") (citing *Madsen* 114 S.Ct. 2516). The *Pro-Choice Original Panel* elucidated this Court's reasons for subjecting injunctions burdening speech to more exacting scrutiny:

> More searching scrutiny of content neutral injunctions restricting expression, as opposed to content neutral legislation restricting expression, is appropriate because of the "greater risks of censorship and discriminatory application" associated with injunctions and the "effective practical guaranty against arbitrary and unreasonable government" inherent in legislation that is to be generally applied.

*Pro-Choice Original Panel*, 67 F.3d at 369 (A-98) (quoting *Madsen*, 114 S.Ct. at 2524) (additional quotation and citation omitted).

Narrowly tailored, as used in the time, place and manner context, merely means, "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. In other words, the time, place, and manner test allows for a regulation incidentally restricting speech; such a regulation is valid so long as it is more effective in achieving the government interests at stake. But "[t]he less-restrictive alternative analysis



has never been part of the inquiry into the validity of a time, place, and manner regulation." *Ward*, at 797. By contrast, injunctive restrictions on speech must be couched in narrower terms, burdening "no more speech than necessary" to serve a significant government interest. Thus, courts are not free to burden speech by injunction if an effective, less restrictive method is available.

The district court's restrictions were not fashioned with an eye towards burdening no more speech than necessary; rather, the court crafted the terms with a view to satisfying the more lenient "time, place, and manner" test fit for generally applicable legislative restrictions. The content-neutral injunction test announced in *Madsen* requires more.

The district court's application of the wrong standard partially explains why it failed to tailor its injunction narrowly, in accordance with the factual record, to burden no more speech than necessary. The district court lost sight of the constitutional limitations on the use of speech-restrictive means when fashioning its injunction. Although the court identified significant government interests to be achieved, the court did not engage in the required narrow tailoring. Had the court been sensitive to burdening no more speech than necessary, it would have concluded, as did the *Pro-Choice Original Panel*, that the other provisions of the injunction adequately served the "general goal of ensuring access to abortion facilities" without prohibiting otherwise peaceful speech in a public forum. *Pro-Choice Original Panel*, 67 F.3d at 371 (A-101).

The "floating bubble zone" was not necessary to achieve the goal of ensuring access to the abortion facilities at issue; it burdened more speech than necessary. The *Pro-Choice Original Panel*, therefore, properly struck down this provision. Because the cease and desist provision forbids all speech, and not just fighting words and physical threats, it too "burdens more speech

than necessary to prevent intimidation and ensure access to the clinic." *Madsen*, 114 S.Ct. at 2529.[7] To the extent the cease and desist provision serves to protect abortion patrons from stress and anxiety caused by Petitioners' speech, the provision is content-based. In addition, the phrase "in such event" as used in the cease and desist provision is void for vagueness. The *Pro-Choice Original Panel* therefore correctly struck down the cease and desist provision as well.

### B. In Order To Satisfy The Requirement In *Madsen* And *Claiborne Hardware*, For Precision Of Regulation, The Lower Court Must Find That Unprotected Behavior So Colors The Entire Collective Effort That The Offending Aspects Of A Demonstration Cannot Be Separately And Less Intrusively Controlled By Any Other Means Than Eliminating All Peaceful Forms Of Protest

This petition concerns two injunctive restrictions. First, the injunction creates floating speech-free bubble zones of 15 feet in radium around any entranceways of, and any individuals and vehicles coming to, or leaving abortion facilities. Paragraph 1(b). Second, the injunction gives any person or group of persons the right to veto Pro-Life sidewalk counseling: the injunction orders Petitioners to "cease and desist" from counseling *at all*, and to cease "demonstrating" within 15 feet of a person or group, whenever that person or group "wants to not have counseling, wants to leave, or walk away." Paragraph 1(c).

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[7] Absent evidence that the protestors' speech is independently prescribable (i.e. 'fighting words' or 'threats'), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." *Madsen*, 114 S.Ct. at 2529 (internal citation omitted).

These restrictions plainly curtail core free speech in a traditional public forum. Streets and sidewalks are quintessential traditional public fora. *United States v. Grace*, 461 U.S. 171, 177 (1983). Verbal communication and leafletting (the components of sidewalk counseling), as well as picketing, are classic forms of free speech. *Grace*, 461 U.S. at 176-77; *Lovell v. Griffin*, 303 U.S. 444 (1938).

Accordingly, Petitioners "presence on the [side] walk is assured as an exercise of [their] constitutional rights." *Oliveri v. Ward*, 801 F.2d 602, 606 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), (upholding right of homosexual activists to demonstrate in front of St. Patrick's Cathedral). When present, Petitioners "carr[y] with them there as elsewhere the constitutional right to express [their] views in an orderly fashion." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (internal quotation marks and citation omitted). Petitioners "are entitled to express their view on [abortion], particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted." *New York NOW v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). *See also Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993) (overturning restriction on begging on city streets).

If the First Amendment protects begging, *Loper*, critical picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), in-person urging of a boycott outside the targeted business, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and verbal "harassment" and "interference" with hunters, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), then it must also protect Petitioners' efforts to communicate their Pro-Life message on public sidewalks, even if and when that message is unwelcome. *Accord Madsen v. Women's Health Center*, 114 S.Ct. 2516, 2529 (1994).



## II. The Cease-And-Desist Provision Of The Injunction Entered By The Lower Court And Upheld By En Banc Panel Of The Second Circuit Court Of Appeals In This Case Is Clearly Content Based And Punishes Peaceful Speech In Conflict With This Court's Decision In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) Which Struck Down A Similar No-Approach Zone

In the *Madsen* decision, this Court struck down a no-approach zone not because it extended 300 feet from an abortion clinic, but because it was content based. The obligation of the communicator to retreat was based upon the adverse impact that the communicator's speech had on the communicatee. Likewise, the cease-and-desist provision of the injunction upheld by the Court of Appeals in this case requires communicators to cease and desist communicating with communicatees who express their displeasure with the message expressed by the communicators. This kind of injunction can only be viewed as content based because it gives to potential counselees the right to control the ability of sidewalk counselors to gauge an otherwise protected expression of speech in a public forum.

### A. The Cease-And-Desist Provision Was Unnecessary To Achieve The Government Interests In Access To Clinics And In Public Safety

The *Pro-Choice Original Panel* correctly found the cease-and-desist provision in paragraph 1(c) of the preliminary injunction unconstitutional because this restriction makes a speakers' communication dependent on the consent of the audience. *Pro-Choice Original Panel*, 67 F.3d at 371-372 (A-102 to A-104). The *Pro-Choice Original Panel* correctly identified the similarity between the cease-and-desist provision

here and the "no approach" provision struck down by the Supreme Court in *Madsen*. The cease-and-desist provision reads in pertinent part:

> No one is required to accept or listen to sidewalk counseling, and . . . if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, to walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons seeking to counsel that person or group of persons shall cease and desist from such counseling.

*See* Preliminary Injunction paragraph 1(c), (Appendix A: A-34 to A-35).[8]

The *Madsen* Court struck down a similar provision which ordered that any Pro-Life advocate "refrain from physically approaching any person seeking services of the clinic unless such person indicates a desire to communicate." 114 S.Ct. at 2529 (quoting injunction). This Court held that it could not "justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at 2529.

Although noting that the "cease and desist provision challenged here is somewhat less restrictive than the no approach provision in *Madsen*," *Pro-Choice Original Panel*, 67 F.3d at 71

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[8] Paragraph 1(c) also provides that, upon refusal by a person entering or leaving the clinic to be counseled, the counselors become subject to the clause in paragraph 1(b) requiring them to retreat to a distance of at least 15 feet on penalty of contempt.



(A-103), the Original Panel also observed that both operated identically in principle and effect:

> [B]oth the cease and desist provision here and the no approach provision in *Madsen* operate to allow the prospective counselee to control the prospective counselor's opportunity to engage in protected expression. The provisions are thus equally restrictive of the communication offered by the counselors; both effectively condition the demonstrator's right to engage in protected expression on another person's wish to hear such expression. 67 F.3d at 371 (A-103).

The key objection to this provision, the Original Panel opined, was the power it gives the prospective counselee to veto another's speech. *Id.* But the audience of a prospective speaker, the Original Panel recognized, cannot enlist the power of the state "to stop the counselor's communication, absent any evidence that the communication is independently proscribable [*see Madsen*, 114 S.Ct. at 2529], or that the counselor is engaging in pure conduct that is not protected by the First Amendment." *Pro-Choice Original Panel*, 67 F.3d at 371 (A-103).

The Original Panel noted that the cease-and-desist provision ran directly afoul of the principle stated in *Boos v. Barry*, 485 U.S. 312, 322 (1988): In public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Thus, the Panel "conclude[d] that the cease and desist provision in paragraph 1(c) [of the preliminary injunction] burdens more speech than necessary to serve the identified government interests." *Pro-*

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*Choice Original Panel*, 67 F.3d at 372 (A-104).[9]

The cease and desist provision also burdens more speech than necessary to protect the district court's general goal of ensuring access by allowing one person to veto speech directed at another. The provision allows "anyone or any group of persons" to veto the counseling. Suppose that a woman seeking access to the clinic, who is approached by a sidewalk counselor, chooses to hear what the counselor has to say. Suppose further than an "escort" or companion walking with her (or purporting to walk with her) vetoes any attempt to communicate.

If the counselor continues to communicate with a willing recipient, while a companion objects, the counselor risks a $10,000.00 fine. This is a particularly foreseeable situation considering that facility patrons are often escorted by Pro-Choice Network volunteers who are hostile to Pro-Life counseling and who readily object to every word coming from a Pro-Life counselor's mouth. Nor can it be doubted that a financial motivation exists for facility employees to deliberately trigger the cease-and-desist provision to avoid the loss of business if a sidewalk counselor should successfully persuade a pregnant woman not to abort her offspring.

**1. The Injunction Is Content-Based To**

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[9] Incredibly, Respondents below assert that *Madsen* actually requires this court to uphold the "cease and desist" provision. Respondents claim that in both cases mass demonstrations spilled onto the facility driveway, forcing cars to slow down before entering. In the first place, this analogy is false. Respondents tendered no evidence that, after the TRO issued, the number of protesters presented the sort of obstruction/traffic management problem faced in *Madsen*, where up to 400 demonstrators were present at the clinic at one time or another. In the second place, respondents' attempt to force an analogy to *Madsen*'s facts is irrelevant: *Madsen* struck down the "no approach" provision *despite* the presence of mass demonstrations and repeated obstruction.



**The Extent It Is Justified To Protect Respondents' Customers From Unwanted Speech**

The cease-and-desist provision and the bubble zones both suffer from content-based defects.

First of all, the cease-and-desist provision is flagrantly tied to the unwelcomeness of speech. It is impossible for a defendant to violate that clause without trying to counsel and express a message, and the only reason ever proffered by Respondents or the district court for that part of the injunction was the desire to shield clinic patrons from the allegedly upsetting effect of hearing statements they do not want to hear. But as this Court has emphasized: "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395, 2403 (1992). *See also Dorman v. Satti*, 862 F.2d 432, 437 (2d Cir. 1988) (holding that ban on "harassing" of hunters was content based because it was desired to shield from annoying messages). Since the "cease and desist" clause is not content neutral, it cannot be justified as a "time, place, and manner" restriction, and is "presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992).

Second, both the cease-and-desist provision and the bubble zone suffer from content-based justifications. The district court justified the preliminary injunction, in part, to prevent stress and anxiety to patients and clinic staff.[10] The district

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[10] "The district court also justified the injunction on the ground that . . . prospective patients at the facilities, as well as staff members, would suffer adverse effects, especially stress and anxiety, from Project Rescue's activities, causing an increase in the risks associated with the abortion procedure." *Pro-Choice Original Panel*, 67 F.3d at 369 (A-97).

court found that under the circumstances "there is an attendant need for a calm, quiet, stress-free atmosphere." *Pro-Choice*, 799 F.Supp. at 1434 (A-168). On this premise, the district court justified the imposition of the bubble zones to avoid stress caused from "invading the [] personal space" of clinic patrons. *Id.* The district court intimated that further communication with persons who "indicated" they no longer wanted to listen was also presumably the cause of stress and anxiety. *Pro-Choice*, 799 F.Supp at 1428, 1434 (A-170). *See also Pro-Choice Original Panel*, 67 F.3d at 369 (A-97).

In short, the district court justified the bubble zones and the cease-and-desist provision on the basis that Petitioners' expressive activity caused emotional stress to clinic patrons and staff workers thereby hampering access. Such a premise, however, fuses the government's legitimate interest in preserving access with the constitutionally suspect government interest in avoiding stress caused by speech.[11] Such fusion is confusion. Collapsing these two distinct interests into one precludes the "precision of regulation" required of an injunction restriction speech and allows the smuggling in of an unconstitutional goal: sheltering persons from effects of otherwise protected speech. Ensuring physical "unimpeded access" might justify a narrowly

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[11] The district court carefully ignored any possible cause of stress aside from Petitioners' speech. Petitioners' speech, by default, was then targeted and restricted as if it were the only source of stress.

The district court found that the Pro-Choice "escorts often respond by raising their voices in order to drown out the counselors' message, and attempt to block and impede the sidewalk counselors' from following the patients. While the Court can understand the frustration of the escorts, the evidence adduced at the hearings clearly shows that their behavior often serves only to exacerbate an already difficult situation." 799 F.Supp. at 1425 n.6 (A-148). Yet the court completely disregarded the role of escort heckling and blocking in causing patient stress.



tailored regulation, but ensuring emotionally sheltered access does not.

Avoiding communication-related stress is, indeed, a novel "significant government interest." The sort of "First Amendment" that would allow a party in a public place to silence unwanted communication because he experiences emotional stress would be weak indeed. Allowing speech to be curtailed merely because an unwilling listener cries "stress" -- because, for example, he does not wish his conduct to become the object of moral scrutiny or criticism -- would not bode well for the future of the First Amendment, and makes a mockery of its past.

Fortunately, this Court has addressed this exact question. *Madsen*, 114 S.Ct. 2516 (absent evidence that the speech is independently proscribable by injunction); *United States v. Eichman*, 496 U.S. 310 (1990) (Federal Flag Protection Act proscribing flag burning because of the emotional impact on others found unconstitutional); *Texas v. Johnson*, 491 U.S. 397, 407 n.4 (1989) (Texas state statute found unconstitutional because prohibition on speech was triggered by impact it had on citizens' view of the flag as a symbol of national unity); *Boos v. Barry*, 485 U.S. 313 (1988) (federal law protecting foreign embassies from political criticism because of negative feeling generated in audience observing criticism held unconstitutional); *Hustler Magazine, Inc.*, 485 U.S. 46 (1988) (First Amendment precludes state tort claims for intentional infliction of emotional distress caused by speech when the medium of expression itself is not independently proscribable).

When a regulation "suppresses expression out of concern for its likely communicative impact . . . its restriction on expression cannot be justified without reference to the content of the regulated." *Eichman*, 496 U.S. at 317-18 (citation omitted). Doubtless, a regulation prohibiting speech acts "that would cause

serious offense to others . . . , depend[ing] on the likely communicative impact of his expressive conduct . . . is content-based." *Johnson*, 491 U.S. at 411-12. Discussing the validity of a city ordinance upheld in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court said:

> Regulations that focus on the direct impact of speech on its audience present a different situation . . . If the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with [the impact of the speech,] then analysis of the measure as a content-based statute would have been appropriate . . . The emotive impact of speech on its audience . . . must be considered content-based.

*Boos*, 485 U.S. at 321.

Justifying restrictions by asserting heightened anxiety levels engendered in abortion clinic patrons and staff by Petitioners would run "afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine*, 485 U.S. at 55; *see also NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982). Indeed, the *Pro-Choice Original Panel* found that the district court's justification for the injunction, to avoid "stress and anxiety" in prospective patients and staff members, was of doubtful constitutional validity:

> To the extent that, in this case, an injunction's purpose of avoiding stress to prospective clinic patient is closer to avoiding offense, *see Boos*, 485 U.S. at 321, than to avoiding violence, *see Johnson*, 491 U.S. at 407 n.4, that purpose might constitute a justification that impermissibly refers to content.



*Pro-Choice Original Panel*, 67 F.3d at 369 (A-98).

It is difficult indeed to conceive of speech on a controversial issue that would not cause anxiety to someone. Respondents seek to persuade this Court that once a person asserts he has suffered stress due to expression, the First Amendment no longer protects the speaker. Once accepted, that rationale would leave the First Amendment in tatters. The bubble zone and the cease-and-desist provisions are content-based censorship to the extent they are justified because of alleged stress or mental reaction of, or emotive impact on, the Respondents' customers and staff.

Ironically, the district court findings concerning the dangers from anxiety and stress due to Petitioners' speech, although clearly expressed, are unsupported by expert medical testimony. There was not one single witness below who testified that he or she had ever suffered any damage, trauma or other cognizable injury other than "stress" because of Petitioners' speech. Not one of those witnesses was even a clinic patient. There was absolutely no evidence that anyone was ever physically denied access or treatment, or suffered physical injury, because of Petitioners' speech activity. Respondents did put on hearsay testimony that a few clinic patrons abandoned their appointments at the clinic because of the presence of the Pro-Life advocates near the facilities. This testimony, however, is hardly reliable for two reasons and irrelevant for another. First, none of the persons alleged to have abandoned their appointments at the clinic actually testified. Second, not one of them was identified so that they could be called as witnesses by the defendants. In fact, all of the witnesses below who said that the patrons told them they were deterred because of the Petitioners' speech activities worked either for an abortion

facility clinic or Pro-Choice Network, *i.e.*, were far from neutral. Despite the district court findings, the record offers not one shred of evidence that proves that a patient was ever denied medical treatment or put at risk because of Petitioners' speech. Finally, even assuming some would-be patrons cancelled out because of anti-abortion activities, this is no reason to restrict speech. The First Amendment would be truly flaccid if it protected only ineffective speech.

## CONCLUSION

The Petitioners respectfully request this Court to grant this Petition and correct the manifest damage to the First Amendment wrought by the *Pro-Choice En Banc Panel*.

Dated: New York, NY.
December 26, 1995

Respectfully submitted,

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# APPENDICES

## APPENDIX A

**PRO-CHOICE NETWORK OF WESTERN NEW YORK; Buffalo GYN Women Services, Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D.,**

**Plaintiffs-Appellees,**

**v.**

**Rev. Paul SCHENCK, Dwight Saunders, Defendants-Appellants, Project Rescue Western New York, Operation Rescue, James L. Evans Rev., Ted Cadwallader, Rev., David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Rev., James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, John Doe(s), Jane Doe(s), the last being fictitious two names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations and others acting in concert with any of the defendants who are engaging in, or intend to engage in the conduct complained of herein, Project Life of Rochester, Gerald Crawford, and David Long, Defendants.**

**No. 1215.**
**Docket 92-7302.**

United States Court of Appeals,
Second Circuit.

Argued March 24, 1994.

Decided Sept. 6 1994.

Argued in banc April 17, 1995.

Decided Sept. 28, 1995.



**[380]**[1] Vincent P. McCarthy, New Milford, CT (Joseph P. Secola, McCarthy & Secola, New Milford, CT; Jay Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, Byron J. Babione, American Center for Law & Justice, Washington, DC, of counsel), for Defendants-Appellants.

Lucinda M. Finley, Buffalo, NY (Glenn Murray, of counsel), for Plaintiffs-Appellees.

Deval L. Patrick, Assistant Attorney General, Washington, DC; David K. Flynn, Samuel R. Bagenstos, of counsel, for the United States as Amicus Curiae.

**[381]** Michael P. Tierney, New York City, for Legal Center for Defense of Life as Amicus Curiae.

Martha F. Davis, Yolanda S. Wu, Deborah A. Ellis, New York City, for NOW Legal Defense and Educations Fund, American Medical Women's Association, B'nai B'rith Women, Catholics for a Free Choice, Center for Reproductive Law and Policy, Connecticut Women's Education and Legal Fund, Inc., Feminist Majority Foundation, Lamda Legal Defense and Education Fund, National Abortion Federation, National Center for Lesbian Rights, National Women's Law Center, Northwest Women's Law Center, National Organization for Women, Women's Law Center, Women's Law Project, Women's Legal Defense Fund, and YWCA of the U.S.A. as Amici Curiae.

Dennis C. Vacco, Attorney General of the State of New York, New York City; Victoria A. Graffeo, Solicitor General,

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[1] Bracketed numbers in bold type indicate page numbers from decision reported at 67 F.3d 377 (2d Cir. 1995).

Robert A. Forte, Assistant Attorney General, of counsel, for State of New York as Amicus Curiae.

Steven R. Shapiro, Janet Gallagher, Louise Melling, Karen Laiter, New York City, for American Civil Liberties Union Foundation as Amicus Curiae.

Arthur N. Eisenberg, Donna Lieberman, Yueh-ru Chu, New York City, for New York Civil Liberties Union Foundation as Amicus Curiae.

Before NEWMAN, Chief Judge, OAKES, MESKILL, KEARSE, WINTER, MINER, ALTIMARI, MAHONEY, WALKER, McLAUGHLIN, JACOBS, LEVAL, CALABRESI, CABRANES, and PARKER, Circuit Judges.

OAKES, Senior Circuit Judge, with whom Chief Judge NEWMAN and Circuit Judges KEARSE, MINER, WALKER, LEVAL, CALABRESI, CABRANES, and PARKER join:

This appeal was reheard in banc to reconsider the constitutionality of two provisions of an injunction issued against abortion clinic protesters. One provision creates fifteen-foot buffer zones around abortion clinic entrances, driveways, vehicles entering clinic driveways, and patients entering or leaving the clinics; two "sidewalk counselors" are allowed in the buffer zones to "counsel" patients as they approach or leave the clinics. The second provision requires that if a patient expresses a desire to be left alone, the counselors must "cease and desist" and retreat to outside the buffer zone. The issue arises on an appeal by anti-abortion protesters from an order of the United States District court for the Western District of New York, Richard J. Arcara, Judge, issuing the injunction. We hold that inclusion of the two provisions in the injunction was proper, as they burden no more speech than necessary to further significant



government interests. We therefore vacate the portion of the panel opinion striking down these provisions, and we affirm these two provisions as modified.

Background

Plaintiffs-Appellees Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in Western New York that offer family planning and gynecological services, including abortion services, at their health care facilities. Plaintiff-Appellee Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. Its primary goal is to maintain legal and safe access to family planning and abortion services in the Western New York area.

While the Defendants were comprised of the organizations Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and fifty individuals who oppose abortion and have engaged in demonstrations at or near abortion clinics in Western New York, the only Appellants are the individuals Rev. Paul Schenck and Dwight Saunders.

I. *The Lawsuit*

This case commenced on September 24, 1990, when the Plaintiffs (collectively "Pro-Choice Network") filed suit against the Defendants (collectively "Project Rescue") asserting seven causes of action. The first [382] alleges that the defendants are engaged in a conspiracy to deprive women seeking abortions of the privileges and immunities of national citizenship and the equal protection of the laws in violation of 42 U.S.C. § 1985(3). The remaining six causes of action assert claims based on New

York State law. They are: (1) violation of N.Y. Civil Rights Law § 40-c and N.Y. Executive Law § 296; (2) tortious interference with business; (3) trespass; (4) intentional infliction of emotional harm; (5) tortious harassment; and (6) false imprisonment.

Along with the complaint, Pro-Choice Network filed a motion for a temporary restraining order (TRO) pursuant to Fed.R.Civ.P. 65(b) to enjoin a "blockade" the defendants had announced for September 28, 1990. After a hearing, the district court issued a TRO enjoining defendants from "blockading" the plaintiffs' medical facilities and from harassing the patients and staff entering or exiting those facilities.[1]

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or

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[1] The TRO stated in pertinent part: ORDERED that Defendants ... are: 1. Temporarily enjoined and restrained in any manner or by any means from: (a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed; (b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are preformed; Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such an event the persons seeking to counsel that person shall cease and desist from such counseling of that person.



employee of a health care facility where abortions are performed in the Western District of New York, nor shall any person make such sounds which interferes [sic] with the rights of anyone not in violation of this Order; (d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b) and (c) above.

Pro-Choice Network moved to have the TRO converted into a preliminary injunction. With the consent of the parties, the district court ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided. While the motion was pending, Pro-Choice Network filed civil contempt motions against six individual defendants and against Project Rescue, alleging violations of the TRO on six separate occasions (though hearings on only five of these were held prior to the issuance of the preliminary injunction).

## II. *The District Court Opinion*

From March 6, 1991, to April 1, 1991, the district court held a hearing on the preliminary injunction motion. The court also held hearings on the civil contempt motions intermittently from February 6, 1991, through January 30, 1992.

### A. *Factual Findings*

As a result of the evidence taken at those hearings, the district court, in an opinion and order issued February 14, 1992, made extensive findings of fact, as summarized below.

Project Rescue organizes and participates in "rescue" demonstrations at clinics throughout Western New York, including medical facilities associated with Plaintiffs-Appellees. Through these demonstrations, Project Rescue intends to prevent

abortions, dissuade women from seeking abortion services, and impress upon the public the morality of its "pro-life" views. The demonstrations are mostly peaceful in nature, but they often become emotionally charged encounters between demonstrators, patients and patient escorts.

Project Rescue has stipulated that a physical "blockade," which prevents patients and [383] staff from entering or exiting a medical facility, may be enjoined. Thus, only two demonstration methods used by Project Rescue are at issue in this case: (1) constructive "blockades," in which demonstrators protest and picket in a loud and disruptive manner outside the medical facilities and harass patients and staff entering and exiting the facilities; and (2) "sidewalk counseling" of patients entering the facilities.

The constructive blockades have the same goal as the physical blockades--preventing utilization of the clinics. Instead of physically blocking patient access to the clinics, Project Rescue constructively blockades the clinics by forcing patients and staff to run a gauntlet of harassment and intimidation.

> At times, demonstrators yell at patients, patient escorts and medical staff entering and leaving the health care facilities. The demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff.

*Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992) (*Pro-Choice I*). This harassment and intimidation causes stress and sometimes even physical injury to the patients and medical



staff, and generally disrupts the atmosphere necessary for rendering safe and efficacious health care.

In implementing the constructive blockades, Project Rescue also targets vehicles entering the driveways of the medical facilities:

> Demonstrators frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities. The presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger to both the occupants of the cars and the demonstrators themselves. The demonstrators also make loud and disruptive noises and chant persistently.

*Id.*

These activities, on some occasions, have so intimidated and confused patients approaching the clinics that they have left the areas, causing them to suffer a delay in obtaining medical care. This delay can increase the risks associated with an abortion:

> For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to

> undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded ... the above-mentioned complications may result.

*Id.* at 1427. In some instances, as when the women come from a distance, they cannot easily reschedule their appointments once they have been deterred by Project Rescue from obtaining an abortion on the scheduled day.

In addition to constructively blockading the medical facilities, Project Rescue engages in a form of advocacy known as "sidewalk counseling." Demonstrators approach patients entering the clinics, offer them anti-abortion literature, and try to convince them not to have an abortion. While Project Rescue contends that this sidewalk counseling is done in a peaceful manner, the demonstrators often become angry and frustrated when patients persist in entering the clinics:

> The "counselors" then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering. They continue to do so even after the patients signal their desire to be left alone. The "sidewalk [384] counselors" often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level.



*Id.* at 1425. Many of the sidewalk counselors have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff.

The patients who have been the target of Project Rescue's "sidewalk counseling" and other "rescue" efforts usually enter the medical facilities shaken and severely distressed:

> Several of the plaintiff health care providers testified that, for most women, the decision to undergo an abortion is already difficult and stressful. Plaintiffs presented uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

*Id.* at 1427. In addition, the patients are often too agitated to undergo medical procedures, and thus must postpone their appointments--although they may well again encounter the demonstrators upon their return. In such cases, the delay in treatment may increase the risks associated with the medical procedures as discussed above.

Finally, "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints about 'pro-life'

demonstrators harassing patients and blocking access to the clinics." *Id.* at 1426. The protests occur continually, and the local police do not have the resources to monitor the situation constantly. A number of protesters have been prosecuted under local laws, but have not been deterred from repeatedly engaging in their illegal pattern of activity.

B. *The Injunction*

Based on these facts, the district court found that Project Rescue's activities threatened to continue into the future, and unless enjoined would cause clinic patients irreparable harm, including increased medical risks and the denial of constitutionally protected rights. The court found that injunctive relief was required to prevent that harm.

The court also found that Pro-Choice Network had demonstrated a likelihood of success on the merits of its § 1985(3) claim, based both on the right to travel and the right of women to choose to have an abortion. It found as well that, having demonstrated a likelihood of success on its claim under § 1985(3), Pro-Choice Network had, by definition, demonstrated a likelihood of success on its claim under New York Civil Rights Law § 40-c. It also found that Pro-Choice Network had demonstrated a likelihood of success on its state trespass claim. As the court decided that these claims provided sufficient grounds for the injunction, it did not address whether an injunction should issue based on Pro-Choice Network's other state law claims.

On February 14, 1992, the court issued the injunction now at issue in this appeal. (the injunction is reproduced as an Appendix to this opinion.) Paragraph 1(a) of the injunction enjoins Project Rescue from trespassing on, sitting in, blocking, impeding, or obstructing access to the entrances, including the



parking lot entrances and driveways, of any medical facility that performs abortions in the Western District of New York.

Paragraph 1(b) creates fifteen-foot buffer zones around the entrances to those medical facilities, their driveways and driveway and parking lot entrances, and around any person or vehicle seeking access to or leaving the facilities. The provision prohibits Project Rescue from demonstrating within the buffer zones except that two sidewalk counselors may enter, as provided in Paragraph 1(c).

Paragraph 1(c) enjoins Project Rescue from physically abusing, grabbing, touching, pushing, shoving, or crowding any people entering or leaving the medical facilities. It also provides, however, that the demonstrators are free to participate in "sidewalk counseling," which the section defines as a conversation of a non-threatening nature by not [385] more than two people. The section further provides that if a person or group of people does not want to be counseled, or wants to leave or walk away, the counselors must "cease and desist" from counseling, and shall then be governed by the provisions of Paragraph 1(b) that prohibit demonstration within the fifteen-foot zone.

Paragraph 1(d) prohibits Project Rescue from using mechanical loudspeakers or sound amplification devices or making any excessively loud sounds which endanger the health of the patients at the medical facilities. Paragraph 1(e) prohibits Project Rescue from aiding or abetting others in acting in violation of other sections of the injunction. Paragraph 2 provides for penalties of $10,000 and up per day for violations of the injunction.

The district court carefully reviewed the terms of the injunction to ensure that the provisions did not violate Project

Rescue's First Amendment rights. As the court's decision was issued before the Supreme Court's recent opinion in *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 *reh'g denied*, ___ U.S. ___, 115 S.Ct. 23, 129 L.Ed.2d 922 (1994), the court applied the then-controlling law on restrictions of time, place, and manner of expression, namely that the restrictions must be (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of information. *Pro-Choice I*, 799 F.Supp. at 1432 (citing *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)). The court found that the injunction met all three requirements.

III. *The Appeal*

Two individual defendants, Paul Schenck and Dwight Saunders, appealed, pursuant to 28 U.S.C. § 1292(a)(1), from the district court's order issuing the preliminary injunction. While the appeal was pending, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). The Court held that a § 1985(3) claim, which requires a showing of some invidious, class-based animus and an interference with rights that are protected against private interference, could not be sustained against anti-abortion activists because an opposition to abortion does not reflect an animus toward women in general, and because anti-abortion activists do not conspire with the goal of interfering with interstate commerce.

Soon after *Bray* was issued, Project Rescue moved in district court to dismiss the complaint and vacate the injunction.



It argued that Pro-Choice Network's § 1985(3) claim should be dismissed pursuant to *Bray*, and that, after the federal claim was dismissed, the pendent state claims should be dismissed as well. The appeal from the issuance of the injunction was dismissed by stipulation of the parties, without prejudice to reinstatement by any party within twenty days of the district court's resolution of Project Rescue's motion.

Upon consideration of the motion, the district court dismissed the § 1985(3) claim, with leave for Pro-Choice Network to amend its complaint to bring the § 1985(3) claim within the holding of *Bray*. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 828 F.Supp. 1018, 1027 (W.D.N.Y. 1993) (*Pro-Choice II*). The court further held that, even without the § 1985(3) claim, it was "compelled, under notions of judicial economy, convenience, fairness and comity, to continue to exercise jurisdiction over the remaining state-law claims." *Id.* Thus, the court denied Project Rescue's motion to vacate the preliminary injunction.

Project Rescue appealed from the district court's refusal to vacate the injunction, and the appeal from the issuance of the injunction was reinstated. A panel of this court heard these consolidated appeals on March 24, 1994, and on September 6, 1994, a divided panel issued an opinion affirming the district court's denial of the motion to vacate and upholding all parts of the injunction with the exception of the fifteen-foot buffer zone and the "cease and desist" provision. Judge Oakes dissented from the portion of the opinion striking down the two provisions. *Pro-Choice Network of Western New York v.* **[386]** *Project*

*Rescue Western New York*, 67 F.3d 359 (2d Cir. 1994) (*Pro-Choice*).[2]

Appellees petitioned this court for a rehearing in banc. On December 27, 1994, we ordered a rehearing "limited to the issues of whether the District Court erred in including in the injunction the provision concerning a fifteen-foot buffer zone and the 'cease and desist' provision." *Pro-Choice*, No. 92-7302 (2d Cir. December 27, 1994).

Discussion

The sole issues before us on in banc rehearing are whether the district court erred in including in the injunction (1) the 15-foot buffer zone provision and (2) the "cease and desist" provision. In considering these questions, we do not consider whether these provisions continue to be supportable under Pro-Choice Network's remaining state law claims following the dismissal of its section 1985(3) claim; as the *Pro-Choice* panel found, slip op. at 6992-94, --- F.3d at --- - ---, the district court has not yet had occasion to consider these issues. The issue before us, rather, is solely whether the two contested provisions

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2 This opinion appeared in the advance sheet at 34 F.3d 130-147, but was withdrawn from the bound volume pending a rehearing in banc poll.



impermissibly infringe Project Rescue's First Amendment right to freedom of speech.[3]

[1] The threshold issue is whether the injunction, taken as a whole, is content-based and accordingly subject to strict scrutiny, or content-neutral--that is, justified "without reference to the content of the regulated speech," *Madsen*, --- U.S. at ---, 114 S.Ct. at 2523 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 *reh'g denied*, 492 U.S. 937, 110 S.Ct. 23, 106 L.Ed.2d 636 (1989)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, ___, ___, 112 S.Ct. 2538, 2542, 2544, 120 L.Ed.2d 305 (1992)--and thus subject to less rigorous examination. In light of the Supreme Court's recent opinion in *Madsen*, examining a similar injunction and finding it content-neutral, it is clear that the injunction as a whole is not content-based. In *Madsen*, the Court concluded that the fact that an injunction "restricts only the speech of antiabortion protestors" does not mean that it is content-directed:

> That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group whose conduct violated the court's order happen to share the same opinion regarding abortions being performed at the clinic.

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3 The issues we address in this rehearing arise solely from the appeal of the district court's *Pro-Choice I* decision. Thus, we consider only the facts that were before the district court at that time and do not consider the evidence that was before the court in *Pro-Choice II* regarding the "Spring of Life" protests which took place after the injunction was issued.

*Madsen*, ___ U.S. at ___ - ___, 114 S.Ct. at 2523-24. In the instant case, as in *Madsen*, the injunction's purpose is both content- and viewpoint-neutral: the court imposed restrictions on the demonstrators not to suppress their anti-abortion message but "incidental to their antiabortion message because they repeatedly violated the court's original order." *Id.* at ___, 114 S.Ct. at 2524. The injunction was imposed on Project Rescue to prevent the irreparable harm that prospective patients would suffer if Project Rescue's "rescue" activities continued to impede access to abortion services. *Pro-Choice I*, 799 F.Supp. at 1428.

[2][3] Since the injunction's purpose is content-neutral, we apply the test set out in *Madsen* to the contested provisions: whether they "burden no more speech than necessary to serve a significant government interest." ___ U.S. at ___, 114 S.Ct. at 2525. As the Court explained, this test, while not amounting to the strict scrutiny that we have applied to content-based restrictions of speech, is more rigorous than the test that has traditionally been applied to content-neutral regulations of the time, place, and manner of expression. *See, e.g.*, *Rock Against Racism*, 491 U.S. at 791, 109 S.Ct. at 2753 (determining whether the regulations were "narrowly tailored to serve a significant governmental **[387]** interest") (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)). We apply more rigorous scrutiny to an injunction which restricts expression than to legislation which does so, the Court reasoned, because "[i]njunctions ... carry greater risks of censorship and discriminatory application than do general ordinances." ___ U.S. at ___, 114 S.Ct. at 2524.

[4] In applying the *Madsen* test, we first examine whether the government interests identified by the district court are significant. The district court identified three interests served



by the injunction, which closely parallel the three interests identified by the Court in *Madsen*. First, it noted, that government "has a legitimate interest in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Pro-Choice I*, 799 F.Supp. at 1433 (quoting *Roe v. Wade*, 410 U.S. 113, 150, 93 S.Ct. 705, 725, 35 L.Ed.2d 147 (1973); *see also Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 (finding significant the government's interest in protecting the psychological and physical well-being of abortion patients). Second, the injunction "effectuates the significant governmental interest of public safety" in that it prohibits defendants from blocking traffic entering and leaving the clinics and from pushing or crowding persons as they enter or leave. *Pro-Choice I*, 799 F.Supp. at 1433; accord *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526. Finally, by protecting plaintiffs' rights to travel and to have an abortion, the injunction "serves the significant governmental interest of ensuring 'that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another.'" *Pro-Choice I*, 799 F.Supp. at 1433 (quoting *New York State NOW v. Terry*, 886 F.2d 1339, 1364 (2d Cir. 1989)); accord *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 (protecting "a woman's freedom to seek lawful medical or counseling services"). We agree, as the Supreme Court did in *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526, that these governmental interests--medical safety, public safety, and access to abortions--are entirely sufficient to justify an appropriately tailored injunction to protect them. Accordingly, we turn to each of the contested provisions of the injunction "to see if it burdens more speech than necessary to accomplish its goal." *Id.*

I. *The Buffer Zone*

Paragraph 1(b) of the preliminary injunction (the "buffer zone provisions") establishes a fifteen-foot buffer zone around the entrances to all facilities in the Western District of New York at which abortions are preformed. The provision enjoins defendants, as well as their agents and representatives "and all other persons ... acting in their behalf or in concert with them," from

> demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons ... shall be allowed[.]

"Sidewalk counseling," as described in paragraph 1(c), consists of "a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel."

In short, this provision establishes what might be deemed a permeable buffer zone with a "floating" fifteen foot radius: demonstrators must remain at least fifteen feet away from each entrance to an abortion facility, the entrance to its parking area and its driveways, and from women, doctors, and other staff at the facility seeking access to or leaving the facility, with the exception that two "counselors" are allowed to enter the buffer zone to engage in "non-threatening conversation" with each person or group of persons approaching or leaving the facility.

[5] Project Rescue contends that the buffer zone provision fails the *Madsen* test in that it "burdens more speech



than necessary" to accomplish its purposes. In particular, it contends, the buffer zone is not necessary to effectuate the goal of securing unfettered access to the clinics because paragraph 1(a) of the injunction, which prohibits Project [388] Rescue from impeding or obstructing access to the clinics, already accomplishes that task.

In evaluating whether the fifteen-foot buffer zone is more burdensome than necessary, we note that the Supreme Court in *Madsen* found a thirty-six-foot buffer zone necessary to protect the government interests enumerated in that case. ___ U.S. at ___, 114 S.Ct. at 2527. The thirty-six-foot buffer zone in *Madsen* was in some ways broader and in some ways narrower than the zone in this case. The *Madsen* zone was narrower in that, while it extended thirty-six feet from clinic entrances, it did not, as in this case, "float" so as to protect persons approaching or leaving the clinic. On the other hand, the *Madsen* zone was broader than the zone before us in two significant ways. First, it extended a more substantial distance--thirty-six feet from the clinic entrances. Second, within that thirty-six-foot zone, the ban it imposed on speech was absolute: it admitted no "sidewalk counselors" or any other form of advocacy within the zone.

The *Madsen* trial court imposed its arguably more restrictive buffer zone on the basis of a record comparable to that considered by the district court in this case. Compare *Madsen*, ___ U.S. at ___ - ___, 114 S.Ct. at 2521-22, with *Pro-Choice I*, 799 F.Supp. at 1423-27. As in this case, the *Madsen* trial court found that the protesters picketed and demonstrated in a way that impeded and blocked public access to the clinics. Also as in this case, it "found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, 'sidewalk counselors' would approach and attempt to give the vehicle's occupants antiabortion literature." *Madsen*, ___ U.S.

at ___, 114 S.Ct. at 2521. The *Madsen* court also found that, as in this case, the protests "took their toll on the clinic's patients." *Id.* A clinic doctor testified--just as doctors did in this case--that the anxiety suffered by patients after having to "run such a gauntlet" to enter the clinics increased the risks associated with the abortion procedures. *Id.* Finally, as with the TRO in this case, the trial court found that despite an initial injunction, protesters continued to impede access to the clinics. *Id.*

We are not convinced by the dissent's recitation of distinctions between the record in the instant case and in *Madsen*. See dissent at 400-401, 403 (noting that this case, unlike *Madsen*, "does not ... involve a full-fledged 'blockade,' "that the pickets were "peaceful" and for the most part complied with the TRO, and that "the bulk of the testimony given at the preliminary injunction hearing pertained to events taking place prior to the district court's granting of the TRO").

First, it is uncontested that this case was filed in response to Project Rescue's announcement that it would conduct a blockade on September 28, 1990; the blockade failed to take place only because the district court issued its TRO enjoining the blockade on the day before it was scheduled to occur. Second, although the district court did not that the "rescue" demonstrations "are usually peaceful in nature," 799 F.Supp.at 1423, it also described at great length the "emotionally charged encounters that ensue as demonstrators "yell at patients" and "crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff," *Id.* at 1423-24; and *see supra*, at 401-403 (describing demonstrators' harassment and intimidation of patients and the harmful effect of this behavior).



[6] Finally, we find unpersuasive the dissent's reminder that Project Rescue demonstrators generally complied with the TRO (with some notable exceptions), and that, in issuing the preliminary injunction, the district court thus relied to a large degree on obstructionist activities which had ceased after the TRO was in place. It gores without saying, of course, that district courts routinely issue preliminary injunctions on the basis of activities which, following a TRO, have already ceased. *See, e.g., ICN Pharmaceuticals, Inc. v. Khan*, 2 F.3d 484, 486-88 (2d Cir. 1993). It is also self-evident that the terms of a preliminary injunction need not be confined to those of an earlier TRO, if the evidentiary hearing--whether concerning pre- or post-TRO activity--makes clear that broader protections are warranted; a TRO is a provisional remedy imposed to maintain the [389] status quo until a full review of the facts and legal arguments is available, *see Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1124-25 (2d Cir. 1989). Lastly, nothing in *Madsen* states, or even implies, that a TRO must fail before a broader injunction may be imposed; the *Madsen* Court simply noted that the failure of an initial injunction to accomplish its purpose is one factor which "may be taken into consideration" in evaluating the constitutionality of a subsequent, broader order. ___ U.S. at ___, 114 S.Ct. at 2527.

In this case, the district court found the buffer zones necessary to effectuate both the goal of ensuring access to the clinics as well as the goal of ensuring the safe performance of abortions. Project Rescue's argument that the buffer zones are not "necessary" because Paragraph 1(a) is sufficient to prevent obstruction of clinic entrances ignores the fact that the zones also further the significant government interest of ensuring medical safety, an interest recognized by the *Madsen* Court. ___ U.S. at ___, 114 S.Ct. at 2526. The district court explained:

> In crafting the injunction, the Court has been guided by the paramount need to maintain an atmosphere conducive to the health care functions of plaintiffs' facilities. As the Supreme Court has advised, in evaluating the need for and legitimacy of restrictions on expressive activity, courts must keep in mind the normal functions of the location in question and whether the nature of the demonstration activity is conducive to or disruptive of normal activities. Here, in the context of health care facilities treating women who are already undergoing the stress normally associated with having an abortion, there is an attendant need for a calm, quite, stress-free atmosphere. Defendants' noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting. The significant governmental interest inherent in providing safe medical care to the public justifies certain carefully drawn restrictions on defendants' expressive activities.

*Pro-Choice I*, 799 F.Supp. at 1433-34 (citation omitted).

We find the district court's reasoning persuasive. In light of the extensive record documenting Project Rescue's harassment and intimidation of patients, and documenting the effects produced by such harassment, *see Id.* at 1427, we cannot find the fifteen-foot buffer zone broader than necessary to protect patients' health and well-being. The buffer zones are quite specifically tailored to effectuate the goals of the injunction. The protesters are prohibited from demonstrating en masse only within a very short radius--fifteen feet--of clinic entrances, parking lot entrances, driveways, and persons or vehicles



"seeking access to or leaving" the clinics.[4] Project Rescue can still picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by. Within the fifteen-foot buffer, "sidewalk counselors" can engage in individualized, face-to-face communication with persons entering the clinics in an effort to persuade such persons, on a personal level, that abortion is wrong. This provision ensures that the injunction does not hamper Project Rescue's message, only its intimidating method of demonstration.

Project Rescue contends nevertheless that, even if we find that concerns for medical safety justify a buffer zone around patients approaching the clinics, these concerns do not justify the injunctions's broad protection of patients "seeking access to or leaving" the clinics. We disagree. We are not convinced that persons leaving a clinic are any less in need of a buffer zone than those approaching a clinic. A person leaving a clinic may just have received an abortion and may consequently be in a medically vulnerable state. Alternatively, she may have visited the clinic for a preliminary appointment prior to scheduling an abortion, and the prospect of "running the gauntlet" again may deter her from [390] returning. As the district court found, delay--whether of the abortion itself or of a post-abortion check-up--can substantially increase the risks associated with an abortion. *See id.*

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[4] We do not address the issue, raised by Project Rescue at oral argument, of how far from a clinic a floating buffer zone may reach to protect a person "seeking access to or leaving" the clinic. This is exactly the type of issue that is best left to case-by-case adjudication by the district court. We are confident that the district court will apply a reasonable geographic scope to the phrase "seeking access to or leaving."

[7] In sum, we find the buffer zones fully justified by the record before us. As the Supreme Court has noted, "some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2527. Although the district court issued the injunction without benefit of the Supreme Court's analysis in *Madsen*, we are fully able to apply the *Madsen* standard to the record below. We conclude that the fifteen-foot buffer zones burden no more speech than necessary to accomplish the governmental interests at stake in this case.

II. *The "Cease and Desist" Provision*

[8] We next examine whether the "cease and desist" provision "burden[s] no more speech than necessary to serve a significant government interest," *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. This provision confers on women seeking access to abortion facilities the right to refuse counseling at an intimate range within the buffer zone:

> [N]o one is required to accept or listen to sidewalk counseling, and ... if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility.



Preliminary Injunction ¶ 1(c).

As with the buffer zone provision, we begin with *Madsen*. Project Rescue contends that we should strike down this provision because the *Madsen* Court struck down a similar provision which, although more restrictive, "operated identically in principle and effect." Appellants' Br. at 24. As discussed below, we do not find *Madsen* dispositive of this issue.

The *Madsen* Court struck down a provision which ordered demonstrators not to approach any person within 300 feet of the clinic who is seeking the clinic's services "unless such person indicates a desire to communicate." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 (internal quotes omitted). The Court disposed of this provision in summary fashion, finding that, absent evidence of threats of violence, the provision violated the general maxim that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988)) (internal quotes omitted). The Court concluded:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic.

*Id.* (emphasis in original).

The categorical "no-uninvited-approach" order of the *Madsen* trial court is significantly different from the "cease and

desist" provision before us. That order gave no opportunity to anti-abortion counselors to proffer their advise at an intimate range unless the counselees "indicate[d] a desire to communicate by approaching or by inquiring of the [counselors]." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2522. They were obliged to remain on the opposite side of the street. *Id.* at ___, 114 S.Ct. at 2526. Even a woman who was willing to receive such counseling could not receive it unless she affirmatively sought it out. This order, in contrast, permits two counselors, acting in a non-threatening manner, to approach for counseling unless the recipient affirmatively refuses to receive such counseling at an intimate range. Thus the "cease and desist" provision is far more solicitous of the demonstrators' interest in approaching their target audience face-to-face and delivering their message. They may [391] approach without being invited and need not retreat unless expressly rejected by a counselee, and then only to a distance of fifteen feet.

Project Rescue contends that the "cease and desist" requirement is impermissibly vague or overboard in several respects. First, Project Rescue notes, the injunction fails to spell out expressly what kind of indication or behavior by prospective "counselees" triggers the requirement that a "counselor" "cease and desist." Paragraph 1(c) states that "if anyone ... wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of person shall cease and desist from such counseling." As Project Rescue notes, the meaning of "in such event" is less than entirely clear: while the reference to a person's "leav[ing]" or "walk[ing] away" is unproblematic, it appears that the "cease and desist" requirement is also triggered by the person's "want[ing] to not have counseling" and "do[ing] that" --a construction that, Project Rescue contends, fails to put "counselors" on proper notice as to when they must leave the buffer zone.



Any vagueness in the provision, however, has already been remedied by the district court. In its February 14, 1992 opinion, the court decided that the "cease and desist" provision will only be enforced if the targeted person or group "indicates, either verbally or non-verbally, that they do not wish to be counseled...." *Pro-Choice I*, 799 F.Supp. at 1434. This interpretation, we think, accords a common sense meaning to the provision and makes clear at what point counseling must cease. Accordingly, we direct the district court on remand to so modify the language of the injunction.

Project Rescue contends, secondly, that he meaning of "cease and desist from such counseling" is unclear. The provision, it contends, may be interpreted to require a rebuffed "counselor" to stop communicating entirely with the woman who has rebuffed the "counselor's" message--a requirement that, it contends, would constitute an unnecessarily broad restriction of defendants' expressive activities. We do not read the provision as Project Rescue urges. "Such counseling," the injunction makes clear, refers to the practice of "sidewalk counseling" described in the preceding sentence: namely, the right of one or two demonstrators to enter the fifteen-foot buffer zone around a prospective patient in order to engage her in "conversation of a non-threatening nature." To "cease and desist from such counseling," accordingly, means to back off from a prospective "counseling" target so that that person is accorded the full protection of the fifteen-foot buffer zone. Once outside this zone, the "counselor," as we see it, may continue advocating his or her beliefs to the woman who has refused them, albeit now from a distance of fifteen feet. The "counselor" remains free as well, of course, to approach anyone else to attempt to "counsel"

them, or to hand out leaflets to passersby, or to demonstrate as she sees fit within the bounds of the injunction.[5]

Thus interpreted, the provision that the parties have dubbed "cease and desist" may more accurately be deemed the "walk away" provision. The purpose of this provision is not, as Project Rescue asserts, to suppress speech because of the anxiety its content produces in its audience, *see Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988), but rather to provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome [392] physical proximity to an extremely vocal group of demonstrators. *Cf. International Soc'y for Krishna Consciousness v. Lee*, ___ U.S. ___, ___, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992) (applying "reasonableness" standard appropriate to government limitations of speech in nonpublic fora). This purpose is content-neutral, as it is the demonstrators' physical proximity which is regulated rather than their message.

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5 In thus interpreting the "cease and desist" provision, we do not decide all the issues raised by Project Rescue. We do not decide, for one, whether a "counselor" could be forbidden from coming within 15 feet of a person who has rebuffed his or her advances, in order to "counsel" another person who has not rebuffed the "counselor." Appellees conceded at oral argument that the injunction as written does not bar this. See tr. of oral argument at 21-22. Nothing in the record suggests that such a scenario has occurred. If the issue arises, it may, of course, be addressed by the district court. Also addressable by the district court, on appropriate application, is Project Rescue's contention that its "counselors" cannot be heard because the patient escorts drown out their message. Project Rescue may, of course, apply to the district court for a modification of the injunction on the basis of this or nay other circumstances which arise.



The district court clearly found that, absent this provision, women seeking access to the clinics were "captive" to Project Rescue's invasive conduct and unable to "walk away":

> Defendants surround the facilities and force women seeking access to them to run a gauntlet of demonstrators, picketers and "sidewalk counselors." The evidence adduced at the hearings clearly shows that, even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message. It is obvious, therefore, that women seeking access to plaintiffs' facilities cannot, as a practical matter, escape defendants' message. Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid receiving defendants' message. The only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion. Thus, women entering plaintiffs' clinics are a "captive audience" for defendants' message and the "cease and desist" provision of the injunction is warranted.

*Pro-Choice I*, 799 F.Supp. at 1436.

The courts have recognized the rights of "captive audiences" to be free not only of unwanted speech occurring outside traditional public fora, *see Krishna Consciousness*, ___ U.S. at ___-___, 112 S.Ct. at 2708-09 (upholding ban on disruptive solicitation of funds in public airport); *Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (2d Cir.) (upholding

ban on subway panhandling out of concern that public transportation be "reasonably safe, propitious and benign"), *cert. denied*, 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990); *see also Lehman v. City of Shaker Heights*, 418 U.s. 298, 303, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974) (plurality opinion) (upholding ban on political advertising on public transportation), but even in traditional fora, in which First Amendment rights are at their zenith, when circumstances indicate a heightened need to protect the right of the listener to be left alone, the courts have done so. *See Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (upholding ban on residential sidewalk picketing given government interest in protecting captive listener's right to privacy in his home). In *Madsen*, the Court acknowledged that an abortion clinic, with the medical risks attendant thereto, presents such circumstances. "[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident," the Court noted, "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." ___ U.S. at ___, 114 S.Ct. at 2526.

The "cease and desist" provision, the district court found, was necessary to protect not only the right of access to abortions but, in effect, the "physical well-being" of women seeking such access and held "'captive' by medical circumstance." On the record before us, we cannot conclude that this finding was erroneous. As a panel of this court has noted in upholding a similar injunction restraining a clinic "rescue" operation, "[i]nsofar as appellants' rights of free speech were exercised in close proximity to individual women entering or leaving the clinics so as to tortiously assault or harass them, appellants' rights ended where those women's rights began." *New York State NOW v. Terry*, 886 F.2d 1339, 1343 (2d Cir.



1989).[6] We agree, **[393]** and we conclude that the "cease and desist" provision passes the *Madsen* test in that it "burden[s] [no] more speech than necessary to accomplish its goal."

## Conclusion

For the reasons set forth above, we conclude that both the buffer zone provision and the "cease and desist" provision are constitutional. Accordingly, we vacate the portion of the panel opinion striking down these provisions, and we affirm these provisions as modified. The remainder of the district court's order, which is not before this in banc court, remains affirmed by the panel's opinion.

## APPENDIX
## PRELIMINARY INJUNCTION

Upon consideration of the evidence introduced at a hearing held on plaintiffs' motion for a preliminary injunction, and at hearings on plaintiffs' motions to find defendants Nancy Walker, Bonnie Behn, Carla Rainero, Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue in civil contempt for violations of this Court's Temporary Restraining Order, and

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[6] The injunction that this court upheld in *Terry* was similarly in some, but by no means all, respects to the *Pro-Choice* injunction. *See Terry*, 886 F.2d at 1345 n.1. For instance, it contained provisions similar to those in paragraphs 1(a) and 1(c) of the *Pro-Choice* injunction, restraining Operation Rescue from blocking access to clinics or harassing women as they entered, and allowing "sidewalk counseling." It did not, however, create a buffer zone, and its "walk away" provision lacked the "cease and desist" language of the *Pro-Choice* injunction as well as the requirement that rebuffed "counselors" retreat to a distance of fifteen feet from their failed targets. *See Id.*

upon consideration of the complaint and supporting documents, and upon consideration of defendants' stipulations pertaining to the entry of a preliminary injunction against certain conduct and to the binding nature of any preliminary injunction on all named individual and organizational defendants, it is hereby

ORDERED that defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

1. Enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed in the Western District of New York;

(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by not more than two persons as specified in paragraph (c) shall be allowed;

(c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they



are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care [394] facility at which abortions are performed, nor shall any person make such sounds which interfere with the rights of anyone not in violation of this Order;

(e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights; and it is further

ORDERED that the defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make a good faith effort to

instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (e) above;

2. IT IS FURTHER ORDERED that the failure to comply with this Order by any defendant or anyone acting in their behalf or in concert with them shall be subject to civil damages of $10,000 per day for the first violation of this Order and/or may subject them to criminal contempt proceedings; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine and/or criminal contempt proceedings; and it is further

ORDERED that any amounts collected thereunder shall be paid to the Plaintiff health care facility at which the violation occurred, or to the Registry of the Court if the targeted health care facility is not a Plaintiff; and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorney's fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.

3. Violations of this Order shall be enforced by appropriate motion.

4. IT IS FURTHER ORDERED that the United States Marshal for the Western District of New York shall read this Order as set forth above in Paragraphs 1 and 2 in their entirety at the site of a demonstration or protest at a facility at which abortions are performed in the Western District of New York. Plaintiffs' counsel shall be responsible for notifying the Marshal



in a timely manner of the location of such demonstration or protest activity.

5. It is the Court's intention that nothing contained in this Order shall supersede or diminish the obligation of local and state law enforcement authorities to fulfill their duties and responsibilities in enforcing state laws and local ordinances.

6. This Order shall remain in full force and effect until modified by further Order, or until final resolution by this Court of the claims for permanent injunctive relief in the above captioned matter.

It is so ordered.

WINTER, Circuit Judge, with whom NEWMAN, Chief Judge, KEARSE, MAHONEY, McLAUGHLIN, JACOBS, WALKER, LEVAL, CALABRESI, and CABRANES, Circuit Judges, join, concurring in the result:

[9] I concur in the result. I write separately because I believe that Judge Oakes's opinion is an application of a somewhat broader principle than it acknowledges, namely that the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs.

[10] Where advocacy is involved, the core notion of the First Amendment is the familiar marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). The goal is to keep channels of communication free of governmentally imposed impediments so that individuals who want to persuade their fellow citizens to adopt a particular belief or to alter intended conduct will have an opportunity to do so. *Kovacs v. Cooper*,

336 U.S. 77, 87, 69 S.Ct. 448, 453, 93 L.Ed. 513 (1949) (plurality opinion).

**[395]** [11] The notion of a marketplace of ideas gives primacy to the right to persuade largely for two reasons. First, we justifiably fear that those who govern will be relentlessly tempted to censor their critics. It is difficult to conceive of a working democracy that does not in some way protect those seeking to speak to votes in the hope of unseating those in power. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 276, 84 S.Ct. 710, 724, 11 L.Ed.2d 686 (1964) ("broad consensus" that restraint upon criticism of government and public officials is "inconsistent with the First Amendment"); *Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed.2d 484 (1966) ("major purpose" of the First Amendment is to protect free discussion of governmental affairs). Second, we want citizens to have exposure to competing ideas in the faith that truth and humane values will have the best chance of prevailing under such a system. *See Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284 (1971); *Whitney v. California*, 274 U.S. 357, 375-76, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). This is, as stated, a matter of faith and not empirically testable. It may also be easy to quarrel with intellectually, until one is asked to fashion a workable, alternative system for the real world. Where advocacy is concerned, therefore, the First Amendment is concerned with persuasion.

[12][13] However, the goal of freeing advocacy from governmental control has important, sometimes overriding, implications for audiences as well as speakers. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970) ("[T]he right of every person 'to be let alone' must be placed in the scales with the right of others



to communicate."). A legal rule implementing a market-place of ideas protects advocates in the interests of the audience. *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8, 106 S.Ct. 903, 907, 89 L.Ed.2d 1 (1986) ("By protecting those who wish to enter the marketplace of ideas ..., the First Amendment protects the public's interest in receiving information.")(plurality opinion). It inexorably requires that individuals who are subject to advocacy be left free to make up their own minds and to adhere to their convictions or intended courses of conduct should they remain unpersuaded. Advocates have a right to a full opportunity to appeal to reason, interest, policy, or morals, but they have no right to seek to alter the mind or conduct of the audience by coercion or obstruction. *See Rowan*, 397 U.S. at 738, 90 S.Ct. at 1491 ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); *Kovacs*, 336 U.S. at 86-87, 69 S.Ct. at 453 (A visitor cannot "insert a foot in the door and insist on a hearing, " and a passer-by may be "offered a pamphlet in the street but cannot be made to take it."); Schneider v. State, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) (acknowledging right to distribute literature "to one willing to receive it"); *cf. International Soc'y for Krishna Consciousness, Inc. v. Lee*, ___ U.S. ___, ___, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992) ("risk[ ] of duress" presents an "appropriate target of regulation"). Those who seek to do more than peacefully persuade individuals, therefore, are themselves acting in a way quite inconsistent with a marketplace of ideas.

[14][15] We thus need not tolerate coercive or obstructionist conduct solely because it serves some passionate ideology or interest. The First Amendment protects peaceful communication, not self-indulgence. Nor need we tolerate such conduct because it makes the advocate feel good. The First Amendment is not a governmental version of the psychiatrist's couch.

[16][17] In determining whether conduct is coercive or obstructionist, some leeway or legal "breathing space" should be allowed to the advocate so that censorship is not disguised as the keeping of order. *See Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988); *Cohen*, 403 U.S. at 26, 91 S.Ct. at 1788. For example, shame is a form of persuasion often expressed in epithets indicating immorality or selfishness that may be regarded by a substantial segment of the public as insulting. However, insults that contains neither threats of coercion that intimidate nor fighting words that create the possibility of imminert violence, *see Chaplinsky v. New Hampshire*, 315 U.S. [396] 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), must be tolerated. Polarizing debates lead to strong language, and an attempt to impose rules of etiquette wold inhibit the debate by forcing speakers to weigh every word and empower government with far too much discretion to define permissible and impermissible modes of advocacy.

[18] The leeway afforded advocates is the greatest where the audience is the general public or is a voluntary rather than involuntary participant. *See Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, ___, 114 S.Ct. 2516, 2527, 129 L.Ed.2d 593 (1994); *Frisby v. Schultz*, 487 U.S. 474, 484-85, 486, 108 S.Ct. 2495, 2502-03, 2503, 101 L.Ed.2d 420 (1988). The general public is a diffuse body that is not easily coerced by words or non-violent symbolic acts. Where more than fleeting exposure to the advocacy is avoidable, moreover, the chance of coercion is low.

[19] However, where specific individuals are targeted at locations difficult or inconvenient for them to avoid, the First Amendment's tolerance of plausibly coercive or obstructionist protest is least, precisely because the temptation and opportunity for coercion or obstruction are at their greatest. *See, e.g., Frisby*, 487 U.S. at 486, 108 S.Ct. at 2503 (affording lesser protection for "targeted picketing" that "inherently and offensively intrudes on residential privacy"). The law need not blind itself to the fact that targeted protest is often directed at individuals who have already given considerable thought to the subject at hand, do not agree with the protestor, and are quite unlikely to be moved by peaceful persuasion. In such circumstances, the protestor may become frustrated, refuse to take "no" for an answer, and be tempted to go beyond persuasion in seeking to change the target's views or conduct.



Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. Rather, they have been sought out at a particular location that they can avoid only at a cost, *see, e.g., Krishna Consciousness*, ___ U.S. at ___, 112 S.Ct. at 2708 (upholding restrictions on expression at an airport in part because travelers are often weighted down by baggage, in a hurry, and some "cannot easily avoid ... solicitation"), and the opportunity to bring direct coercive or obstructive pressure on the individuals is great, *see Madsen*, ___ U.S. at ___, 114 S.Ct. at 2528 ("The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."). Moreover, the power of televised pictures of coercive or obstructionist conduct to chill others is considerable and an independent reason motivating some protestors to go beyond peaceful persuasion. For example, one may be legitimately skeptical about whether residential picketing is designed to persuade anyone by the strength of the argument presented. *See, e.g. Frisby*, 487 U.S. at 486, 108 S.Ct. at 2503 ("[P]icketing ... narrowly directed at [a] household ... do[es] not seek to

disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."). Rather, it seeks to compel the homeowner to buy peace by abandoning convictions and to warn those who might share the homeowner's convictions to alter their views or suffer the same fate.

[20] In my view, therefore, there is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion. Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect on some members of society need not be ignored. The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.

[21][22] My emphasis on protecting targets of protest from coercive or obstructionist conduct should not be mistaken for a failure to acknowledge that the state has **[397]** other interests in preventing such behavior. In *Madsen*, for example, the Court noted the state's "strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." ___ U.S. at ___, 114 S.Ct. at 2526. Society has a strong interest in permitting businesses, universities, and medical clinics to operate, in protecting commerce and the flow of traffic, and in allowing individuals to have privacy in their residences and otherwise to use their property. These are important interests and are frequently invoked to justify restraints on protestors. However, I believe it worth emphasizing that coercion or obstruction does not gain First Amendment protection simply because no one is physically injured, traffic



moves, and private property is not invaded. A placid scene that is the result of citizens not going where they wish to be in order to avoid bullying is hardly consistent with a marketplace of ideas.

[23] I would also note that my views are not an application of doctrines concerning public or non-public fora, *see Krishna Consciousness*, ___ U.S. at ___, 112 S.Ct. at 2705; *Hague v. CIO*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 963-64, 83 L.Ed. 1423 (1939) (Roberts, J.), or captive audiences, *see Frisby*, 487 U.S. at 484-85, 108 S.Ct. at 2502-03; *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 468, 72 S.Ct. 813, 823, 96 L.Ed. 1068 (1952) (Douglas, J., dissenting), although those doctrines inform some of the distinctions discussed above. Those doctrines define circumstances in which government may restrict speech that is otherwise protected. My point is that coercive or obstructionist conduct is not protected by the First Amendment in any forum and regardless of the nature of the audience. As noted, the legal breathing space afforded the protestor in defining coercion or obstruction may vary according to the forum and ability of the audience to avoid the protest at little cost. However, actual coercion or obstruction is not protected speech at any time or in any place.

Turning to the present case, affirmance of the district court is dictated generally by this principle. The protests here were not directed at the general public. The targets were particular individuals who either worked at, or were patients of, the abortion clinic. The location was selected precisely because the targets had to choose either to pass by the protestors or to quit work or forgo services at the clinic. There was, moreover, under either the view of the panel majority or panel dissent, a considerable amount of obstruction and bullying by both the protestors and the self-described counselors. It appears undisputed that a physical blockade of the clinic was planned and

was forestalled only by the issuance of a temporary restraining order. *Pro-Choice Network v. Project Rescue*, 799 F.Supp. at 1424. Moreover, numerous coercive and obstructionist acts occurred before the order issued. The protestors "crowd[ed] around people trying to enter the facilities in an intimidating and obstructing manner, and grab[bed], push[ed] and shov[ed] the patients, patient escorts and staff .." *Id.* The self-described counselors would become "angry and frustrated" when persons showed indifference to their proffers and would "then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts...." *Id.* at 1425. The counselors would "often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level." *Id.* After issuance of the restraining order, at least two further acts of obstruction occurred.

In *Madsen*, the Supreme Court approved an injunction barring anti-abortion protestors from entering a 36-foot zone around the entrances to an abortion clinic. ___ U.S. at ___, 114 S.Ct. at 2527. The majority of the panel that originally decided this appeal believed that the record in *Madsen* revealed a considerably greater history of disruption than does the record in the instant matter. *Pro-Choice Network v. Schenck*, 67 F.3d 359, 371 (2d Cir. 1994). I agree. However, the 15-foot buffer zone is not a significant infringement upon speech and does not require an extensive record of bullying to be justified. A nose-to-nose confrontation is hardly essential to the conveying of the protestors' views and will, given their history of intimidation, be reasonably perceived by those seeking to enter the clinic as intimidating.

**[398]** I also see no constitutional violation in the cease and desist order directed at the counselors. They distinguish their role from that of protestors by claiming that they seek only



to provide patients with information relating to the availability of alternative services, etc. However, some of the counselors in the instant matter have in the past resorted to bullying as soon as their proffer of advice was rebuffed, and I see no First Amendment barrier to a requirement that, once the would-be counselors have had an opportunity to offer advice and it is declined, they must respect the buffer area applicable to protestors.

Moreover, the court is unanimous in the view that some form of injunction was justified, and Judge Arcara's order was an entirely reasonable response to the events that occurred. Indeed, an order that commands a specific physical separation but does not prevent communication in an ordinary tone of voice gives certainty to the advocate as to what is lawful and thus avoids the risk of a contempt adjudication for violating a vague order not to interfere with entry or exit. One irony of the appellants' position in this court is that they attack the specific portions of the order as unconstitutionally rigid and the more general portions of the order as impermissibly vague.[1]

I thus concur in the result.

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[1] I do not agree with the panel's view that, because the protestors generally (but not entirely) complied with the restraining order, a more specific buffer zone and cease and desist provision could not be imposed by the preliminary injunction. The bullying and planned blockade did not disappear from the record because most of the protestors were on good behavior while the preliminary injunction was under consideration. In my view, the district court had ample discretion to impose specific restraints in the preliminary injunction to insure that such conduct was not renewed.

JACOBS, Circuit Judge, with whom MAHONEY, Circuit Judge, joins, concurring in the result:

I join fully in Judge Winter's opinion. I write separately to frame my concern that Judge Oakes' opinion invokes a set of governmental interests so narrowly drawn as to be message specific.

Judge Oakes' opinion repeatedly describes the governmental interests at stake in terms of vulnerable and agitated patients seeking a potentially dangerous medical procedure in the tranquil precincts of a clinic. Since the only other governmental interest emphasized by Judge Oakes' opinion is the interest in preserving abortion rights, the Appellants are to be forgiven if they suspect that the opinion and rationale can have no realistic application other than the regulation of anti-abortion protest.

Of course, the rationale for any injunction affecting speech will take account of specific circumstances and the conduct of the individuals whose expression is affected. The governmental interests invoked to justify a restraint on protests, however, should not be so narrow that they squelch only one side of a single controversy.

I vote to uphold the injunction for the reasons stated in Judge Winter's opinion, and because I think the result is required by *Madsen*. The rationale adopted in *Madsen*, however, was not message specific. Although the *Madsen* Court did identify "governmental interests" in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy", and in the "physical well-being of the patient held 'captive' by medical circumstance," *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526, the Court also invoked broader state interests in public safety and the right to travel that transcend the



abortion controversy: "The State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." *Id.*

If the governmental interests justifying the *Pro-Choice* injunction were as narrow as Judge Oakes' opinion describes (the protection of the health and rights of women seeking medical attention at an abortion clinic), the injunction would be much too broad, for it casts a bubble over pedestrians and car passengers regardless of whether a woman--**[399]** let alone a patient--is among them. In their brief, the Appellants iterate that the injunction insulates "clinic patrons and staff," "prospective patients and staff members," and that none of the witnesses claiming to have suffered stress or other injury "was even a clinic patient." (Emphasis added). Thus the Appellants argue that the bubble-zone cease and desist provisions are "content-based censorship to the extent they are justified because of alleged stress or mental reaction of, or emotive impact on, the [clinic's] customers and staff." (Emphasis added).

The bubbles in *Madsen*, which excluded protestors from the areas adjacent to the clinic's entrances, thereby insulated the clinic's clientele as well as other persons entering and leaving the clinic, such as the clinic accountant, nurses and doctors, and friends of the patients. No distinction between patients and other persons would have been feasible in *Madsen* if access for patients was to be secured. This lack of differentiation becomes a problem in *Pro-Choice*, however, because the floating bubble is in the nature of personal armor. Yet the injunction does not limit this protection of personal space to women seeking abortion services, or to groups that include such a woman, or even to a groups of pedestrians or automobile passengers that include at least one woman. Rather, a bubble is cast over every "person

or vehicle seeking access to or leaving" the clinic. Paragraph 1(b). Thus the injunction protects the private space of every male staff member walking alone to the clinic.

Such an injunction cannot be justified solely by a governmental interest in preserving the health (and medical choices) of patients at abortion clinics. Ultimately, the justification for this injunction rests on the government interests set forth in Judge Winter's opinion, and the broad interests identified in *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 (public safety, the free flow of traffic on public sidewalks and property rights of all citizens).

MESKILL, Circuit Judge, dissenting (with whom Judge ALTIMARI concurs):

Today thirteen of this Court's judges give approval to an injunction which seriously infringes on the constitutional rights of freedom of speech and expression. The reasons for this judgment are stated in two separate opinions, expressing two separate rationales. I refer to the two opinions as the Judge Oakes opinion and the Judge Winter opinion rather than calling either the majority opinion because each has garnered the support of more than half of the members of the in banc court. In my view, neither opinion provides an adequate foundation for the Court's ultimate decision. I therefore dissent.

A careful examination of the entire record in this case should lead to one conclusion: the inclusion of both the buffer zone and the cease and desist provisions in the injunction fails the analysis enunciated in *Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Indeed, as I read the record, what was done by appellants--the picketing, the leafletting, the voicing of protest--was done in the finest tradition of the First Amendment, hardly justifying so



sweeping an abridgement of free speech. Regrettably, the majority today concludes otherwise, embarking this Court on an ill-fated journey whose destination is the dilution of the public forum doctrine, the very core of the First Amendment. To such a result I cannot agree.

I

Permeating Judge Oakes' analysis is the belief that we should simply defer to the district court's decision, relying on its familiarity with the facts and background of this dispute. In fashioning its injunction, however, the district court proceeded under the "reasonable time, place, and manner" standard. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). Subsequently, the Supreme Court decided *Madsen*, holding that the evaluation of injunctions restricting speech required a "more stringent application of general First Amendment principles." See ___ U.S. at ___, 114 S.Ct. at 2524. In an attempt to convince the reader that the injunction crafted **[400]** under the more lenient "time, place,and manner" standard also satisfies the more "rigorous," *Id.*, *Madsen* standard, Judge Oakes' opinion ignores much of the record and misstates some of what it does not ignore.

Judge Oakes' opinion properly acknowledges that the *Madsen* standard is the appropriate starting point for our analysis of the injunction in this case. Consequently, the opinion purports to apply *Madsen's* standard for evaluating the constitutionality of content neutral injunctions restricting expressive conduct in a traditional public forum: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.*

at ___, 114 S.Ct. at 2525. Indeed, Judge Oakes peppers his opinion with references to the *Madsen* test, citing to it no fewer than ten times. *See, e.g., Oakes* op. at Discussion I ("We conclude that the fifteen-foot buffer zones burden no more speech than necessary to accomplish the governmental interests at stake in this case."); *Oakes* op. at Discussion II ("We agree, and we conclude that the 'cease and desist' provision passes the Madsen test in that it 'burden[s] [no] more speech than necessary to accomplish its goal.'"). Yet, remarkably, the analysis fails to adhere to *Madsen* even once, as evidenced by the opinion's ultimate approval of two provisions of an injunction that clearly ban significantly more speech than necessary to achieve the injunction's legitimate goals.

A. *The Buffer Zone*

One who reads the Oakes opinion must wonder how any disagreement (let alone a dissent) could exist among members of this Court regarding the so-called buffer zone, given that the opinion leaves the unmistakable impression that the facts of this case are so similar to those in *Madsen*. *See, e.g., Oakes* op. at Discussion I ("The *Madsen* trial court imposed its arguably more restrictive buffer zone on the basis of a record comparable to that considered by the district court in this case."). This impression is no accident; indeed, it is purposefully created. For without this mischaracterization the opinion simply could not fit this case into the *Madsen* rule.

In *Madsen*, despite an earlier injunction prohibiting the protestors from blocking access to the clinic, crowds of up to 400 people stood, knelt and sat in the public street leading up to the clinic and in the clinic's entryways, thereby physically preventing potential patients from entering the clinic and slowing the flow of vehicular traffic. *See Operation Rescue v. Women's*



*Health Center*, 626 So.2d 664, 667 (Fla. 1993), *aff'd in part, rev'd in part, Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). As patients' cars approached the clinic driveways, moreover, the throngs swarmed the vehicles, "running along side of and in front of [them], pushing pamphlets in car windows." *Operation Rescue*, 626 So.2d at 678 (quoting injunction). The demonstrations at times required the presence of nearly fifty police officers to control the crowds, to ensure the flow of traffic, and to permit patients to enter the clinics. Additionally, the trial court found the demonstrations infused with violence, cataloging the incidents of unlawful acts in its opinion. For instance, threats were made to clinic staff, patients and employees--"[o]n [one] occasion [a clinic] doctor was followed as he left the clinic by a person ... who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle." *Id.* Phone lines were jammed, making it impossible for the clinic to summon emergency aid. The court further noted that stalking of patients and staff was a tactic regularly employed by the demonstrators. In short, the clinic in *Madsen* was subject to the type of "rescue" demonstration activity more aptly described as a "blockade." *See Pro-Choice Network of Western N.Y. v. Project Rescue Western N.Y.*, 799 F.Supp. 1417, 1424 (W.D.N.Y. 1992) (explaining that "blockade" is a large-scale demonstration where demonstrators "sit or lay in the entrances of the clinic in an attempt to block access to and egress from the clinic").

This appeal also involves demonstrations outside abortion clinics. Unlike *Madsen*, however, our case does not, as the district court specifically found, involve a full-fledged **[401]** "blockade." *See Id.* at 1424 n.5 ("Commendably, there have been no physical 'blockades' since the Court issued the [temporary restraining order]."). Rather, on the public sidewalks in front of family planning clinics in the Western

District of New York, a group of five to forty activists distributed literature about abortion and abortion alternatives, engaged in "sidewalk counseling" in an effort to inform and educate, picketed, carried signs, sang, participated in prayer vigils, changed and shouted anti-abortion slogans. The record, moreover, is clear: the protestors obeyed, not disobeyed, the district court's temporary restraining order (TRO), which prohibited them from blocking access to the clinics. At no time did the appellants organize en masse sit-ins, lay down in entryways, link hands or chain themselves together, trespass on clinic premises, or make any other attempt to physically blockade clinic property in an effort to deprive women of their constitutional right to choose an abortion. Indeed, the demonstrations generally were orderly and peaceful, a fact Judge Oakes himself acknowledges. *See Oakes* op. at Background II-A ("The demonstrations are mostly peaceful in nature."); *see also Pro-Choice*, 799 F.Supp. at 1423. With this more accurate picture of the record in mind, I address the constitutionality of the buffer zone.

Paragraph 1(b) of the injunction creates a "First Amendment free zone" around the clinics, banning, as it does, the entire universe of expressive activity within fifteen feet of the clinics, except for the allowance of two sidewalk counselors. The district court provided for the buffer zone in an effort to ensure "unfettered access" to the clinics as well as to "prevent defendants from crowding" patients and invading their personal



space." *Pro-Choice*, 799 F.Supp. at 1434.[1] As the original panel determined, this restriction burdens more speech than necessary to accomplish these goals. *See Pro-Choice Network v. Schenck*, 67 F.3d 359, 370-371 (2d Cir. 1994).

Significantly, paragraph 1(b) is cumulative. Other portions of the injunction, left intact by the panel majority's opinion, prohibit all obstructionist activities, thereby promoting the aforementioned goals. Specifically, paragraph 1(a) of the injunction, without any buffer zone, prohibits protestors from "trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed." Indeed, in the words of the district court, paragraph 1(a) covers

> obstructing and impeding access to and egress from the clinics, congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving or interfering with patients and staff as they approach the clinic on foot.

*Pro-Choice*, 799 F.Supp. at 1434. Paragraph 1(c), moreover, bars protestors from "physically abusing, grabbing, touching, pushing, shoving, or crowding" any clinic staff member or

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[1] The Oakes opinion asserts that the safe performance of abortions was also a goal of the district court in effectuating the buffer zone. The district court, however, never gave this as a stated reason. *See Pro-Choice*, 799 F.Supp. at 1434. Moreover, Judge Oakes offers no explanation whatsoever as to the correlation between the creation of fifteen foot bubble zones around the clinics and the safe performance of abortions in the clinics.

patient. *Id.* at 1440 (emphasis added). Finally, paragraph 1(d) enjoins "using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed." *Id.*

The inescapable conclusion is that "the [buffer] zone provision ... forbids conduct even beyond that which would obstruct or impede access." *Pro-Choice*, slip op. at 6999, ___ F.3d at ___. Indeed, within the fifteen-foot buffer zone, the preliminary injunction restricts such sacrosanct First Amendment conduct as holding a placard containing an antiabortion message, passive leafletting or handbilling, silent picketing and even the mere voicing of protest. The Supreme **[402]** Court, however, consistently has confirmed not only the constitutionally protected status of such activities but their importance in our society. *See, e.g., Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988) (stating that law prohibiting display of certain signs "operates at the core of the First Amendment"); *Carey v. Brown*, 447 U.S. 455, 466-67, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980) ("Public-issue picketing,an exercise of ... basic constitutional rights in their most pristine and classic form, has always rested on the highest rung of the hierarchy of First Amendment values.") (quotation and citation omitted, alteration in original); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971) ("This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment."). In light of the extensive protection provided to patients by the other provisions of the injunction, the district court had to establish a specific need for the additional blanket prohibitions imposed by the buffer zone. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525 (instructing courts to pay



"close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech"); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 184, 89 S.Ct. 347, 353, 21 L.Ed.2d 325 (1968) (instructing courts to tailor injunctive relief "as precisely as possible to the exact needs of the case"). Here, the record simply does not support such a need.[2]

In fact, the district court took great pains to note that the demonstrators had complied with the original TRO, which contained no buffer zone provision around clinic entrances. *See Pro-Choice*, 799 F.Supp. at 1424 & n.5. The TRO likewise enjoined the demonstrators from "trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility ... at which abortions are performed." *Id.* at 1440. The demonstrators' post-TRO activities generally

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[2] The Oakes opinion, quoting the district court with approval, states that appellants' "noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in [this] setting." Oakes op. at Discussion I (quoting *Pro-Choice*, 799 F.Supp. at 1434). While perhaps not obvious from the opinion, these demonstrations did not occur within the health care facilities, they took place on the public sidewalks of the Western District of New York. On public sidewalks, the quintessential public forum, see *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983), "expressive activity will rarely be incompatible with the intended use of the property, as is evident from the facts that they are 'natural and proper places for dissemination of information and opinion,' *Schneider v. State*, 308 U.S. 147, 163 [60 S.Ct. 146, 151, 84 L.Ed. 155] (1939), and from 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague v. CIO*, 307 U.S. [496,] 515 [59 S.Ct. 954, 964, 83 L.Ed. 1423] [(1939)]." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 817, 105 S.Ct. 3439, 3457, 87 L.Ed.2d 567 (1985) (Blackmun, J., dissenting).

did not obstruct or impede access to the clinics, thereby providing no justification for the addition of a buffer zone prohibiting otherwise peaceful protest. Absent evidence that the protestors undermined the district court's goal of ensuring access, *cf. Madsen*, ___ U.S. at ___ - ___, 114 S.Ct. at 2527-28 (finding failure of first injunction a factor justifying buffer zone), the addition of paragraph 1(b) clearly burdens more speech than necessary to serve the significant government interests relied on by the district court.

In an effort to justify the imposition of the buffer zone the Judge Oakes opinion simply asserts that "despite an initial injunction, protestors continued to impede access to the clinics" and that there was an "extensive record documenting Project Rescue's harassment and intimidation of patients." Oakes op. at Discussion I. Such ambiguous statements, however, hardly prove adequate to assure the "'precision of regulation'" demanded by *Madsen*. *Madsen*, __ U.S. at ___, 114 S.Ct. at 2524 (quoting *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 921, 102 S.Ct. 3409, 3430, 73 L.Ed.2d 1215 (1982)). A thorough study of the record fails to convince me that Judge Oakes' assertions are even justified, given that the pickets were peaceful, there were no threats or acts of violence, and the protestors generally obeyed the TRO. In fact, the bulk of the testimony given at the preliminary injunction hearing pertained to events taking place prior to the **[403]** district court's granting of the TRO--a factor the district court apparently failed to recognize when establishing the buffer zone.

One can only assume, then, that Judge Oakes relies on the five instances of contempt to which he briefly alludes. *See*



*Oakes* op. at Background, section I.[3] Surprisingly, the opinion fails to analyze these violations of the TRO to support the ultimate finding of the demonstrators' intransigence, even though close examination of the factual basis for such an essential conclusion is the customary practice in First Amendment cases. *See, e.g., Claiborne Hardware*, 458 U.S. at 915-16 n.50, 102 S.Ct. at 3420 n.50 ("We must make an independent examination of the whole record ... so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.") (quotations and citations omitted). Importantly, only two of the five contempt violations stemmed from obstructionist behavior, a point well noted in the original panel majority opinion. *See Pro-Choice*, 67 F.3d at 307.[4] One was a March 26, 1991 incident involving Reverends Robert and Paul Schenck in which the two men blocked a doorway to a clinic, and the other was a January 1, 1992 incident involving Reverend Paul Schenck and Daren Drzymala, in which they blocked a facility's driveway. In no way do I condone such behavior nor denigrate the two findings of contempt. However, the Supreme Court's First Amendment jurisprudence clearly requires more than two isolated incidents over the course of one and one-half years before a court may banish an entire protest demonstration from a given area. *See Claiborne Hardware*, 458 U.S. at 915-20, 102 S.Ct. at 3426-29 (discussed *infra*, Part II).

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[3] While Judge Oakes correctly notes that there were six civil contempt motions filed, there were only five contempt judgments entered. The district court found that Pro-Choice had failed to meet its burden of proving one of the incidents alleged. *See Pro-Choice Network v. Walker*, 994 F.2d 989, 993 (2d Cir. 1993).

[4] The other incidents involved the contemnors' failure to observe the TRO's "cease and desist" provision, a provision whose fatal defects I discuss below.

In sum, while deference must be given to the district court's findings, "no constitutional freedom, least of all the guarantees of the Bill of Rights, [may] be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293, 61 S.Ct. 552, 555, 85 L.Ed. 836 (1941). The reality here is that the TRO, with similar provisions to the preliminary injunction's paragraphs 1(a) and (c) and without the over-inclusive buffer zone, effectively secured "unfettered access" to the abortion facilities, thereby making the buffer zone around the clinics more burdensome than necessary under *Madsen*.

Further demonstrating its failure to adhere to the newly enunciated *Madsen* test, the *Oakes* opinion factors that appellants "can still picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by," *Oakes* op. at Discussion I, into its analysis. Considerations of whether the injunction leaves open alternative channels of communication is an element under the previously-used time, place, and manner test, *see Ward*, 491 U.S. at 791, 109 S.Ct. at 2753, and is not controlling here. As Madsen made clear, "standard time, place, and manner analysis is not sufficiently rigorous" in evaluating injunctions restricting expressive conduct. *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. Indeed, while fifteen feet seems trivial to Judge Oakes, the testimony at the preliminary injunction hearing indicated that with respect to some of the clinics, particularly the one at 1241 Main Street in Buffalo, fifteen feet puts the demonstrators in front of an entirely different building. At other clinics, in more suburban locales, the buffer zone is considerably larger than fifteen feet as a practical matter, unless appellants attempt to protest in the middle of the street. None of appellants' objectives will be served by a demonstration in front of a building other than one housing an abortion clinic nor at the other end of the block on the other side of the street. As our



own Judge Mansfield stated, "the effectiveness of any demonstration depends on its proximity to the target and the relevant audience." *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 482 [404] (2d Cir. 1980) (Mansfield J., dissenting), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1352, 67 L.Ed.2d 337 (1981). Accordingly, on this record I would uphold the panel's decision to strike the buffer zone as burdening more speech than necessary to achieve the identified goals.

### B. *The Cease and Desist Provision*

I next turn to the cease and desist provision. Judge Oakes today declares that those entering or leaving an abortion clinic comprise a special group of privileged citizens, immune from the rigors imposed by the First Amendment and constitutionally permitted, by virtue of their decision to have an abortion, to muzzle those expressing disagreement with their ultimate choice. In its haste to silence those attempting to dissuade women from terminating their pregnancies, however, the *Oakes* opinion ignores the First Amendment's "longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine v. Falwell*, 485 U.S. 46, 55, 108 S.Ct. 876, 881, 99 L.Ed.2d 41 (1988). As Justice O'Connor once noted in another abortion-related case, "it [is] painfully clear that no legal rule or doctrine is safe from ad hoc nullification ... when an occasion for its application arises in a case involving ... abortion." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814, 106 S.Ct. 2169, 2206, 90 L.Ed.2d 779 (1986) (O'Connor, J., dissenting). The *Oakes* opinion's holding with respect to the cease and desist provision proves to be no exception. Once again, we see the abortion ad hoc nullification machine at work.

We all agree that *Madsen* is the appropriate starting point for our analysis. Thus, one would think that *Madsen's* treatment of a similar, albeit more restrictive, provision would dictate the outcome here. In *Madsen* the state court had ordered the demonstrators to refrain from physically approaching any person seeking the services of an abortion clinic "'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 (quoting injunction). Assessing the provision, the *Madsen* Court found that it would be difficult to justify enjoining "all uninvited approaches of persons seeking the services of [a] clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at ___, 114 S.Ct. at 2529. Thus, without evidence that the sidewalk counselors' intended communications were "independently proscribable (*i.e.*, 'fighting words' or threats), or [were] so infused with violence as to be indistinguishable from a threat of physical harm," and none was presented, the provision could not stand. *Id.* (citation omitted).

Here, as in *Madsen*, no evidence was introduced before the district court indicating that the attempts of the sidewalk counselors at communicating with the prospective patients, however emotionally charged those encounters might have been, transcended the bounds of protected speech. The communications were not "independently proscribable," that is, they did not fall into the category of "fighting words"--speech which provokes immediate violence, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942)--nor could the communications be perceived as so infused with violence as to be indistinguishable from a threat of physical harm. *See Milk Wagon Drivers*, 312 U.S. at 292-93, 61 S.Ct. at 554-55. Therefore, like the no approach provision



in *Madsen*, *see Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529, the cease and desist provision at issue in this in banc is incompatible with the most basic principle of free expression: "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos*, 485 U.S. at 322, 108 S.Ct at 1164 (quoting *Falwell*, 485 U.S. at 56, 108 S.Ct. at 882). Accordingly, the original panel majority, like the Court in *Madsen*, found that the cease and desist provision burdened more speech than necessary to serve the previously identified government interests. *See Pro-Choice*, slip. op. at 7001-02, ___ F.3d at ___.

Judge Oakes seeks to avoid the controlling ramifications of *Madsen* and to justify a total **[405]** departure from its holding by seizing on any distinction, however insignificant, between the two cases. Thus, he tells us that the cease and desist provision here "is far more solicitous of the demonstrators' right to approach their target audience" than the one examined in *Madsen*, *Oakes* op. at Discussion II, as the provision does not completely prohibit sidewalk counselors from initiating conversation with potential counselees. This difference, while real, can hardly serve as the basis for such disparate treatment. Both provisions similarly prove problematic in that they confer on potential counselees the right to control the ability of the sidewalk counselors to engage in otherwise protected expressive speech in a public forum. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 ("The 'consent' requirement alone invalidates this provision."). Indeed, while the cease and desist provision provides for no express consent requirement, as did the no approach provision in *Madsen*, it does so *sub silentio*, and thereby runs afoul of the First Amendment. *See Boos*, 485 U.S. at 322, 108 S.Ct. at 1164; *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365, 22 L.Ed.2d 572 (1969) ("It is firmly

settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Judge Oakes attempts to circumvent this well-entrenched tenet of First Amendment jurisprudence by reliance on the captive audience doctrine. But it is only where an unreceptive audience is truly "captive" that courts will assure the listener protection from offensive speech. The Supreme Court principally has limited application of the captive audience doctrine in the traditional public forum to those cases in which the speaker intrudes on the privacy of the home or its environs, for the "resident is figuratively, and perhaps literally, trapped within the home." *Frisby v. Schultz*, 487 U.S. 474, 487, 108 S.Ct. 2495, 2504, 101 L.Ed.2d 420 (1988) (upholding ordinance banning picketing outside private residences); *see also Florida Bar v. Went For It, Inc.*, ___ U.S. ___, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (upholding ban on lawyer direct-mail solicitations to accident victims and their relatives); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970) (upholding statute that allowed householder to remove name from junk mail lists); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (upholding ban on amplified sound trucks in residential neighborhoods); *see generally Eugene Volokh, Freedom of Speech and Workplace Harassment*, 39 UCLA L.Rev. 1791, 1832-43 (1992) (arguing captive audience doctrine should not apply to listeners outside their homes). Outside of this context the doctrine has been used sparingly--only when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125 (1975) (emphasis added), i.e., where the audience is physically constrained by its environment. *See Lehman v. Shaker Heights*,



418 U.S. 298, 307, 94 S.Ct. 2714, 2719, 41 L.Ed.2d 770 (1974) (Douglas J., concurring) (recognizing riders on public bus to be a captive audience); *cf. Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (2d Cir.) (noting in dicta that passengers riding on subway are akin to a captive audience), *cert. denied*, 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990).

It is difficult to see how a person approaching a clinic on a public street or sidewalk can feel a captive of two counselors who are limited to non-threatening speech and are prohibited from "physically abusing, grabbing, touching, pushing, shoving or crowding" the entrant. In fact, in such traditional public fora the Supreme Court consistently has stressed that the conflict between the right of speakers to disseminate their message, however unpleasant, and the desire to protect individuals from hearing it should be resolved in favor of the First Amendment. *See, e.g., Erznoznik*, 422 U.S. at 212, 95 S.Ct. at 2274 (rejecting captive audience doctrine as basis for upholding ordinance banning the showing of films containing nudity on drive-in movie screens: "The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes . . . . Thus, we conclude that the limited privacy interest of persons on public streets cannot justify **[406]** this censorship of otherwise protected speech on the basis of its content."); *Spence v. Washington*, 418 U.S. 405, 412, 94 S.Ct. 2727, 2731, 41 L.Ed.2d 842 (1974) (per curiam) (rejecting captive audience doctrine as basis for statute prohibiting improper use of the flag, as "[a]nyone who might have been offended could easily have avoided the display"); *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971) (reversing conviction based on display of profanity in public courthouse, as those unsettled by speaker's message "could effectively avoid further bombardment

of their sensibilities simply by averting their eyes"); *see also International Soc'y for Krishna Consciousness v. Lee*, 925 F.2d 576, 586 (2d Cir. 1991) (Oakes, C.J., dissenting) (arguing that travelers in airport are not a captive audience as "the Constitution requires those who are offended by the Krishnas to avoid further bombardment ... by averting their eyes") (quotation omitted), *aff'd in part on other grounds*, ___ U.S. ___, 112 S.Ct. 2709, 120 L.Ed.2d 669 (1992). By holding otherwise, Judge Oakes' opinion today pushes the captive audience doctrine further than any appellate court has ever gone--and to a holding completely unsupported by any precedent in our case law.[5]

Significantly, patients approaching the clinics are not powerless to avoid the message of the sidewalk counselors. Those unwilling to accept non-threatening counseling remain free to do so--however insistent the sidewalk counselors may be, the counselee on the public street or sidewalk can escape the unwanted message simply by continuing to walk towards and entering the clinic. *Cf. Lehman*, 418 U.S. at 307, 94 S.Ct. at 2719 (Douglas, J., concurring) ("One who hears disquieting or unpleasant programs in public places ... can get up and leave. But the man on the streetcar has no choice but to sit and listen.") (quotation omitted). As long as the injunction ensures access to the clinics, which it clearly does, the right to refuse sidewalk

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[5] The *Oakes* opinion's selective quoting from *Madsen* notwithstanding, that case cannot be read as support for the use here of the "captive audience" doctrine. The *Madsen* Court simply recognized that women in the clinic were "held 'captive' by medical circumstance," *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women approaching the clinic are captive, and nothing in *Madsen* can be read as so holding.



counseling remains secure. Moreover, patients are not forced or compelled to read any of the literature distributed to them outside the clinics. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 78, 103 S.Ct. 2875, 2886, 77 L.Ed.2d 469 (1983) (Rehnquist, J., concurring) ("the recipient ... 'may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket'") (quoting *Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 542, 100 S.Ct. 2326, 2336, 65 L.Ed.2d 319 (1980)) (alteration in original). While counselors may cause distress to those attempting to enter the clinics, such offense is an inevitable cost of free expression under the First Amendment. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 895, 93 L.Ed. 1131 (1949). This may be small comfort to those confronted with sidewalk counseling but, as Justice Brennan once wrote, "that minor inconvenience is a small price to pay for the continued preservation of so precious a liberty as free speech." *Lehman*, 418 U.S. at 320-21, 94 S.Ct. at 2726 (Brennan, J., dissenting).

Indeed, the patient here is about to choose a course of conduct that is final and irreversible--the termination of the life of a fetus. The choice is a difficult one, perhaps made more so because the information conveyed by the sidewalk counselors may cause the patient to question the wisdom or morality of the earlier decision to terminate the pregnancy. This fact, however, is no reason to give the message less protection than we accord other unwelcome speech, *see, e.g., Olivieri v. Ward*, 801 F.2d 602, 606-08 (2d Cir. 1986) (permitting homosexual group and counter-demonstrators to protest outside St. Patrick's Cathedral), *cert. denied*, 480 U.S. 917 **[407]** 107 S.Ct. 1371, 1372, 94

L.Ed.2d 687 (1987), commercial speech, *see, e.g., New York State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 844 (2d Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 511, 130 L.Ed.2d 418 (1994), and even pornography. *See, e.g., Carlin Communications v. FCC*, 749 F.2d 113, 121-23 (2d Cir. 1984) (invalidating regulations on telephone "dial-a-porn" services). It is a sad day for the First Amendment when a message intended to inform women of the consequences of undergoing an abortion occupies a lower rung of protection than that enjoyed by a commercial message on a billboard, *see National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir.), *cert. denied*, 498 U.S. 852, 111 S.Ct. 146, 112 L.Ed.2d 112 (1990), or sexually explicit literature. *See 754 Orange Ave. Inc. v. City of West Haven*, 761 F.2d 105, 111-13 (2d Cir. 1985).

Judge Oakes additionally attempts to justify this gagging of the protestors by asserting that the provision provides "a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." Oakes op. at Discussion II. If it is only "unwelcome physical proximity" that needs to be prevented, however, then surely there are ways to do so short of banishing the entire practice of sidewalk at the counseling command of the counselee. *See Claiborne Hardware*, 458 U.S. at 916, 102 S.Ct. at 3427 (demanding "precision of regulation" in injunctions prohibiting constitutionally protected activity) (quotation omitted).[6] But to say that sidewalk counseling may

[6] Ironically, by forcing the counselors to withdraw fifteen feet and to "continue advocating his or her beliefs to the woman who has refused them" from that distance, *Oakes* op. at Discussion II, the injunction as modified by the *Oakes* opinion forces those who wish to exercise their First Amendment rights to resort to raising their voices, which inevitably leads to a more hostile environment-something to be avoided.



be regulated is not to say that it may be prohibited in its entirety, certainly not at the will of those who dislike the message. *See Bolger*, 463 U.S. at 71, 103 S.Ct. at 2883 ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977)). Indeed, even amicus American Civil Liberties Union, which generally supports appellees' position on the injunction, views the cease and desist provision as too restrictive in this respect.

Further, Judge Oakes' reasoning leads me to question the content (and viewpoint) neutrality of the cease and desist provision.[7] He claims that it is the demonstrators' physical proximity that is regulated rather than their message, thus making the provision content and viewpoint neutral. Testimony largely ignored by the opinion, however, indicates that another "extremely vocal group," the group of patient escorts, is allowed to get physically close to this "vulnerable group of medical patients," often even closer than the sidewalk counselors themselves. As the district court noted,

> [T]he patient escorts also become frustrated and angry by the persistence of the "sidewalk counselors." The patient escorts often respond by raising their voices in order to drown out the "counselors'" message, and attempt to block and impede the "sidewalk counselors" from following the patients .... [T]he evidence adduced at the hearings clearly shows that their

[7] I note that the *Madsen* Court left open the question of whether the no approach provision was content-based. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2529 n.6.

> behavior often serves only to exacerbate an already difficult situation.

*Pro-Choice Network*, 799 F.Supp. at 1425 n. 6. If the cease and desist provision truly was aimed at extremely vocal groups who come within "unwelcome physical proximity" to clinic patients, then the escorts no doubt should be included in the injunction's coverage. That they are not, see *Oakes* op. at n.5, leads to an inescapable conclusion: Judge Oakes' term "unwelcome" does not refer to the physical proximity of the demonstrators, but to their message. Such censorship is entirely impermissible under the First Amendment. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992) ("Listeners' reaction to speech is not a content-neutral **[408]** basis for regulation."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, ___, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992) ("The First Amendment generally prevents government from proscribing speech ... because of disapproval of the ideas expressed."); *Boos*, 485 U.S. at 321, 108 S.Ct. at 1163. I need not dwell on this point for long, as even under the less than strict scrutiny test for content-neutral restrictions on speech, the "cease and desist" provision fails to pass constitutional muster.

I would uphold the panel's decision to strike the cease and desist provision as burdening more speech than necessary to achieve the significant interests identified by the district court.

II

Judge Winter's concurring opinion reiterates the unassailable principle that "the First Amendment odes not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about



ordinary affairs." *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972) ("Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.") (footnote omitted); *Milk Wagon Drivers*, 312 U.S. at 298, 61 S.Ct. at 557 (holding an injunction banning picketing was "justified only by the violence that induced it and only so long as it counteracts a continuing intimidation"). Where attempts to persuade others through the application of force rather than persuasion by reason occur, of course courts should not hesitate to sanction and enjoin such conduct. Indeed, on this ground the original panel majority affirmed the issuance of the preliminary injunction in the first instance and upheld those portions of the injunction restraining the protestors from engaging in violent, unduly coercive or obstructionist behavior. *See, e.g., Preliminary Injunction*, ¶ 1(a) (barring trespassing, blocking or impeding access to clinics); ¶ 1(c) (enjoining "physically abusing, grabbing, touching, pushing, shoving, or crowding" of clinic patients or staff); ¶ 1(d) (prohibiting "making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee").

Where Judge Winter and I part company is in his apparent belief that we may uphold an injunction that sweepingly denies appellants their constitutional right to express their views peaceably without an extensive record documenting coercive, obstructionist or violent conduct. As I read the relevant Supreme Court case law, before an injunction banning both protected and non-protected demonstrative activity may be justified there first must be a showing that such coercive behavior is pervasive, "color[ing] the entire collective effort," *Claiborne Hardware*, 458 U.S. at 933, 102 S.Ct. at 3436, thereby leading to the conclusion that the offending aspects of a demonstration cannot be separately and less intrusively controlled

by any means other than eliminating all peaceful forms of protest. *See, e.g., Milk Wagon Drivers*, 312 U.S. at 294-96, 61 S.Ct. at 555-56 (upholding injunction on peaceful picketing "to prevent future coercion" because the protesting "was set in a background of violence" which was "neither episodic nor isolated"). This is the very essence of *Madsen's* "burdens no more speech than necessary" test. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526 ("We think a standard requiring that an injunction 'burden no more speech than necessary' exemplifies 'precision of regulation.'") (footnote omitted) (quoting *Claiborne Hardware*, 458 U.S. at 916, 102 S.Ct. at 3427). Indeed, if *Madsen's* "burdens no more speech than necessary" requirement may be satisfied merely by pointing to a few isolated instances of coercive or obstructionist behavior in a protest, it is not much of a requirement at all.

Perhaps no case better illustrates this point than *Claiborne Hardware*. *Claiborne Hardware* also involved protest demonstrations where protected forms of expression were intermixed with unduly coercive activity, far more coercive than that encountered in our case. The protests at issue there centered around a boycott of white-owned businesses by a group of Blacks seeking racial equality and integration. During the boycott "sporadic acts of violence ensued." 458 U.S. at 902, 102 S.Ct. at 3420. For instance Charles Evers, the leader of the boycott, told a group that "boycott violators would be 'disciplined' by their own people [409] and warned that the Sheriff could not sleep with boycott violators at night." *Id.* Evers further stated: "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'" *Id.* (footnote omitted). In support of the boycott peaceful and orderly pickets were organized outside of white-owned stores. Further, "store watchers" were posted outside of the boycotted stores to identify those who did business with the merchants. *Id.* at 903, 102



S.Ct. at 3420. The names of these violators were read at meetings of the local NAACP chapter and published in a local Black paper. These boycott violators "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites." *Id.* at 904, 102 S.Ct. at 3421 (quotation omitted). Some, moreover, had shots fired at their houses, bricks thrown through their windshields and had their property damaged.

In response the trial court issued a broad permanent injunction. The order enjoined the protestors from stationing the "store watchers" at white-owned businesses; from "persuading" anyone from breaking the boycott; from"using demeaning and obscene language to or about any person" who continued to trade with white-owned businesses; from picketing outside the white-owned businesses; and from employing any violence against any person or causing damage to any property. *Id.* at 893, 102 S.Ct. at 3415. Despite the evidence of acts of violence and intimidation the Supreme Court nonetheless set aside the injunction. The Court stated that isolated acts of non-First Amendment protected activity could not justify a complete prohibition on all protected forms of expression. Indeed, the *Claiborne Hardware* Court went on to say:

> A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of

> avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees. *Id.* at 933-34, 102 S.Ct. at 3436.

I fear that Judge Winter's concurring opinion looks to the proverbial reptiles of this protest to justify the blanket ban on expression imposed by both the buffer zone and cease and desist provisions. Because I believe that appellees have failed to satisfy their "heavy" burden of demonstrating that the instances of coercion and otherwise unprotected conduct were so pervasive as to color the entire demonstrations, I remain firm in my belief that these provisions unconstitutionally restrict appellants' First Amendment rights.

III

I am confident that the members of our Court will soon come to regret the damage wrought to our First Amendment jurisprudence. Under either rationale offered for today's result the Court effectively reduces *Madsen's* "burdens no more speech than necessary" test to a mere cliche.

I dissent.

ALTIMARI, Circuit Judge, dissenting:

I am saddened by our holding today. Because I believe that the majority of the Court has departed from a proud tradition of zealously protecting the most fundamental of the



freedoms bequeathed to us by our forefathers--the right to speak freely, on a sidewalk or street corner--I respectfully dissent. Unlike the challenged injunction, which I agreed in the original majority opinion was content neutral, I believe that Judge Oake's decision is content based. Were abortion not the issue, our original disposition would have occasioned littler interest and no notoriety. I write separately only to add a few thoughts to the fine dissenting opinion of Judge Meskill, in which I concur.

In *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 129 [410] L.Ed.2d 593 (1994), the Supreme Court articulated a new test to be applied to content-neutral injunctions. The original panel opinion did nothing more than apply the new standard to the injunction issued by the district court. We concluded that two of the several challenged provisions burdened more speech than necessary and thus violated the rule established in *Madsen*. Having searched thoroughly the record, I am at peace with our initial conclusion. Despite the preferred status that has been conferred upon pure speech as exercised in traditional public fora, both majorities today disregard their solemn duties to jealously guard that speech.

The "floating bubble zone" established by the district court, and now reaffirmed by the Court, is an unprecedented and unwarranted incursion on freedom of speech. In *Madsen*, reviewing a factual record that revealed far more intransigence than was present here, the Court upheld a 36 foot buffer zone to "protect[ ] unfettered ingress to and egress from the clinic," ___ U.S. at ___, 114 S.Ct. at 2527, and to ensure that the protesters did not block traffic on the narrow street that afforded vehicular access to the clinic parking lot. The bubble zone was justified by two conditions: (1) protesters whose zeal and belligerence demanded some sort of buffer zone; and (2) a physical setting that left the state court with "few other options to protect access"

to the clinic. *Id.* As is clear from the original majority opinion, neither of these circumstances obtains here.

Had the protesters in question today in fact infringed the rights of the women seeking access to the clinic, I would be the first to uphold restraints against them. I remain persuaded, however, that the protesters tread only upon the sidewalks and streets--a protected setting for the free exercise of persuasive speech--and not upon the constitutional rights of those individuals seeking access to the clinics. Without reciting a record already familiar to the reader, I shall say only that I am perplexed by the Court's apparent disregard of the district court's commendation of Project Rescue's compliance with the TRO, *see Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1424 n.5 (W.D.N.Y. 1992), a finding that speaks volumes to the lack of necessity for this overreaching injunction. Further, it is undisputed that the unusually restrictive physical setting of the *Madsen* clinic is not duplicated here. It is clear that here, where most of the injunction was upheld, *see, e.g.*, Injunction ¶ 1(c) (precluding crowding); *see also Pro-Choice Network v. Schenck*, 67 F.3d at 372-374 (2d cir. 1994), any bubble zone is more burdensome than necessary, much less one which amorphously wafts along immuring any individual coming or going from the clinic. The insidious nature of the bubble is apparent when one considers that it is (1) invisible: a protester may not know that a person has stepped inside a bubble; and (2) chillingly ill-defined: not only does the injunction fail to identify the distance a bubble may travel, but, even if the distance were somehow divined by the district court, a protester has no way of ascertaining that information.

The Court's treatment of the "cease and desist" provision is even more disquieting. As the Supreme Court has instructed, in certain "traditional settings ... First Amendment values



inalterably prevail." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974). In this case, the restrained speech occurred on streets and sidewalks outside health facilities. Yet the Court today chooses to disregard the very foundation upon which our First Amendment freedoms are built. It is axiomatic that "all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988). *Accord Madsen*, ___ U.S. at ___, 114 S.Ct. at 2522 (public sidewalks are public fora); *Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717 (traditional public fora include open spaces, meeting halls, parks, and street corners). And, as perhaps we all need reminding,

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions **[411]** and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949) (citations omitted).

Resort by the Court to the "captive audience" cases as an effort to evade these bedrock principles rings hollow. The teaching of the captive audience cases is that speech aimed at citizens who are in a place "'as a matter of necessity, not choice,'" *Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717 (quotation omitted), may be entitled to less protection than speech aimed at citizens who could freely exercise the option to go elsewhere. *See, e.g., Frisby*, 487 U.S. at 484-85, 108 S.Ct. at 2502-03; *Lehman*, 418 U.S. at 302-03, 94 S.Ct. at 2716-17 (captive audience on public transportation); *Young v. New York City Transit Autho.*, 903 F.2d at 158 (same). The character of the street--abutting a medical facility--"may well inform the application of the relevant test, but it does not lead to a different test; the [disputed restriction] must be judged against the stringent standards [the Supreme Court has] established for restrictions on speech in traditional public fora ...." *Frisby*, 487 U.S. at 481, 108 S.Ct. at 2500. Moreover, as the Supreme Court directed in *Madsen*, we are to apply an even more stringent test than the familiar time, place and manner analysis where injunctive relief is concerned. The Court today flouts that instruction.

I do not dispute that people seeking access to clinics may be, in some sense of the word, "captives." That label, however, suggests only that the state consequently has a legitimate interest in sheltering their physical and psychological well-being. I have no objection to that laudable goal. It is with respect to how that objective is accomplished that I part ways with my colleagues. To my mind, it cannot be said that a prohibition on signs within fifteen feet of an unwilling listener "burden[s] no more speech than necessary." Nor, I think, can it be said that vesting unwilling listeners--even those "en route to a destination,"--with the absolute power to banish speech to a distance of fifteen feet from a moving target burdens no more speech than necessary.



The Court's ability to construe these provisions such that they pass constitutional muster puts me in mind of Lewis Carroll's classic passage:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
> "The question is," said Alice, "whether you can make words means so many different things."
> The question is," said Humpty Dumpty, "which is to be master--that's all."

*Alice Through the Looking Glass*, Lewis Carroll (1872).

The district court properly found the facts. The Supreme Court gave us the law. And the original majority faithfully applied it, without regard for the subject of the dispute that occasioned issuance of the injunction. The new majorities, however, have sacrificed not only our proper role--to remand a concededly flawed injunction for correction by the district court--but also, in the bargain, the "preferred position" of the First Amendment, *see Beauharnais v. Illinois*, 343 U.S. 250, 285, 72 S.Ct. 725, 745, 96 L.Ed. 919 (1952) (Black, J., dissenting). The question now is "which is to be master--that's all."

> As a result, we have compromised [t]he free trade in ideas which the Framers of the Constitution visualized .... In its place there is substituted a new orthodoxy--an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality, or health of society. Free speech in the constitutional sense disappears. Limits are drawn--limits dictated by

expediency, political opinion, prejudices or some other desideratum of legislative action.

*Id.*

Like Alice, I am befuddled by the whimsy effected today. I dissent.



## APPENDIX B

**PRO-CHOICE NETWORK, of Western New York, Buffalo Gyn Women Services, Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D.,**

**Plaintiffs-Appellees,**

**v.**

**Rev. Paul SCHENCK, Dwight Saunders,**

**Defendants-Appellants,**

**Project Rescue Western New York, Operation Rescue, James L. Evans, Rev., Ted Cadwallader, Rev., David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Galser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Rev., James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, John Does, Jane Does, the last two names being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations and others acting in concert with any of the defendants who are engaging in, or intend to engage in the conduct complained herein, Project Life of Rochester, Gerald Crawford, David Long,**

**Defendants.**

**PRO-CHOICE NETWORK, of Western New York, Buffalo Gyn Women Services, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, Alexander Women's Group.**

**Plaintiffs-Appellees,**

**v.**

**PROJECT RESCUE WESTERN NEW YORK, Operation Rescue, Project Life of Rochester, Paul Schenck, James L. Evans, Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Donna Johanns, James Handyside, Pamela Huffnagle, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Does, Jane Does, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,**



**Defendants-Appellants.**

**Nos. 1215, 1310, Dockets 92-7302, 93-7918.**

United States Court of Appeals,
Second Circuit.

Argued March 24, 1994.

Decided Sept. 6, 1994.

**[362]**[1] Vincent P. McCarthy, Joseph P. Secola, New Milford, CT (McCarthy & Secola, Jay Alan Sekulow, James M. Henderson, Mark N. Troobnick, Byron J. Babione, American Center for Law and Justice, of counsel), for appellants Schenck and Saunders in No. 92-7302.

Laurence D. Behr, Buffalo, NY, A. Lawrence Washburn, Jr., New York City, of counsel, for appellants in No. 93-7918.

Lucinda M. Finley, Buffalo, NY, for appellees.

Before OAKES, MESKILL and ALTIMARI, Circuit Judges.

MESKILL, Circuit Judge:

The principal issue in these appeals is the validity of a preliminary injunction issued by the United States District Court

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[1] Bracketed numbers in bold type indicate page numbers from decision reported at 67 F.3d 359 (2d Cir. 1994).

for the Western District of New York, Arcara, J.[1] [363] In

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[1] The pertinent provisions of the preliminary injunction provide: ORDERED that defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are: 1. Enjoined and restrained in any manner or by any means from: (a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are performed in the Western District of New York; (b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed; (c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that his right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as

(continued...)



No. 92-7302, the appellants appeal from the order issuing the injunction, *Pro-Choice Network of Western New York, v. Project Rescue Western New York*, 799 F.Supp. 1417 (W.D.N.Y. 1992) (*Pro-Choice I*); in No. 93-7918, the appellants appeal from the district court's denial of a motion to vacate the injunction, *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 828 F.Supp. 1018 (W.D.N.Y. 1993) (*Pro-Choice II*). For the reasons stated below, we affirm in part and reverse in part in *Pro-Choice I*, and we affirm in *Pro-Choice II*.

## BACKGROUND

Both appeals arise out of the same underlying case, which commenced on September 24, 1990, when the plaintiffs filed a suit against the defendants alleging, primarily, that the defendants were engaged in a conspiracy to deprive women seeking abortions the privileges and immunities of national citizenship and the equal protection of the laws. The plaintiffs

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[1](...continued)

they decide are necessary at each particular demonstration site; (d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed, nor shall any person make such sounds which interfere with the rights of anyone not in violation of this Order; (e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above; and it is further ... ORDERED that the defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make a good faith effort to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (e) above.

(collectively "Pro-Choice") include an organization, Pro-Choice Network of Western New York, that seeks to ensure legal access to abortion, as well as individual doctors and clinics in western New York that provide health care services, including the performance of abortions. The defendants (collectively "Project Rescue") are various individuals and organizations, including Project Rescue Western New York, that oppose abortion and have engaged in demonstrations at or near certain abortion clinics in western New York.

Pro-Choice's conspiracy claim against Project Rescue, which alleged that Project Rescue sought to violate women's constitutional rights to seek abortion and to travel, was predicated on the first clause of 42 U.S.C. § 1985(3). That provision states in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Pro-Choice's complaint also alleged six pendent state law claims against Project Rescue, including trespass and violation of New



York Civil Rights Law § 40-c (section 40-c).[2] [364] Pro-Choice sought declaratory and injunctive relief, as well as compensatory and punitive damages.

Simultaneously with the filing of its complaint, Pro-Choice moved, pursuant to Fed.R.Civ.P. 65(b), for a temporary restraining order (TRO) prohibiting Project Rescue from conducting an abortion clinic blockade scheduled for September 28, 1990. After a hearing, the district court granted the TRO, enjoining Project Rescue from blockading any of the plaintiff medical facilities and from harassing patients or staff members as they entered or exited those facilities. In accordance with the TRO, Project Rescue held a peaceful demonstration instead of conducting a blockade on September 28.

With the consent of the parties, the district court extended the TRO pending the parties' briefing on whether the

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[2] New York Civil Rights Law § 40-c provides in pertinent part: 1. All persons within the jurisdiction of this state shall be entitled to the equal protection of the laws of this state or any subdivision thereof. 2. No person shall, because of ... sex ..., be subjected to any discrimination in his civil rights, or to any harassment ... in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state. New York Civil Rights Law § 40-d provides the remedies for violations of section 40-c. It states in pertinent part: Any person who shall violate any of the provisions of the foregoing section ... or who shall aid or incite the violation of any of said provisions shall for each and every violation thereof be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby in any court of competent jurisdiction .... In addition, any person who shall violate any of the provisions of the foregoing section shall be deemed guilty of a class A misdemeanor.

TRO should be converted into a preliminary injunction. During this period of extension, Project Rescue moved to dismiss or to stay the action pursuant to the abstention doctrine on the ground that a parallel proceeding was pending in state court. After a hearing, the district court denied the motion. On Project Rescue's motion for reconsideration, the district court agreed to reconsider the denial, but reaffirmed its previous decision on the ground that the pending state action was "'dead in the water'." *Pro-Choice I*, 799 F.Supp. at 1439. Also during the period in which the TRO was extended, Pro-Choice filed motions for civil contempt against several individual defendants and against Project Rescue itself. The district court ultimately granted these motions. *See Pro-Choice II*, 828 F.Supp. at 1028-29; *see also Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) (*Pro-Choice III*) (dismissing for lack of appellate jurisdiction appeals by three individuals against whom motions for civil contempt were granted).

As to whether the TRO should be converted into a preliminary injunction, the district court heard arguments and took evidence, and made numerous factual findings. *See Pro-Choice I*, 799 F.Supp. at 1424-27. The court first found that Project Rescue utilizes several different demonstration techniques: actual physical blockades of abortion facilities, constructive blockades of such facilities, and sidewalk counseling. The court then noted that, because Project Rescue had conceded that the physical blockades could be enjoined and in fact had not engaged in any physical blockades of clinics since the issuance of the TRO enjoining such blockades, the court would focus on the other two demonstration techniques. *Id.* at 1424 n.5.

The district court found that constructive blockades are designed to prevent access to abortion clinics by intimidation or



dissuasion and by physical obstruction of people trying to enter the clinics. Moreover, the court found that constructive blockades involve not only "forcing patients to run a gauntlet of harassment and intimidation," but also picketing, congregating near driveway entrances, making "loud and disruptive noises," yelling, pushing, and shoving. *Id.* at 1424. The court found that these constructive blockade techniques cause stress and physical injury to clinic patients and employees and disrupt the atmosphere necessary for providing medical care.

The court also found that sidewalk counseling, in which demonstrators seek to persuade a patient not to have an abortion, often becomes a "charged encounter" because of "the highly emotional nature of the abortion issue." *Id.* at 1425. These encounters involve harassment, badgering, intimidation and yelling. The court noted that some of the defendants had persisted in sidewalk counseling despite having been arested for harassment. *Id.* at 1424-25.

The district court also made numerous findings regarding the health effects of Project Rescue's demonstrations on women seeking services at the abortion clinics. The court found that "[w]omen who have been the [365] target of 'sidewalk counseling' or other 'rescue' demonstrations usually enter the medical facilities visibly shaken and severely distressed." *Id.* at 1427. The court noted that the stress associated with being the subject of sidewalk counseling exacerbates the stress that often accompanies the decision to seek an abortion, thus increasing the risks associated with having an abortion. *Id.* Also, because some women find it necessary to reschedule their appointments or postpone necessary follow-up procedures because of Project Rescue's demonstrations, delays are created that may also lead to increased medical risks. *Id.*

On the basis of these fact, the district court found that women seeking access to the plaintiff medical facilities would suffer irreparable harm from Project Rescue's activities if no injunction issued. *Id.* at 1428. Moreover, the court found that Pro-Choice had demonstrated a likelihood of success on the merits of its section 1985(3) claim based both on the right to travel and on the right to seek an abortion. In light of the finding of a likelihood of success on the section 1985(3) claim, the district court concluded that Pro-Choice had, "by definition," also established a likelihood of success on the section 40-c claim. *Id.* at 1431. Finally, the court found that Pro-Choice had demonstrated a likelihood of success of the merits of its state law trespass claim. Having thus found that Pro-Choice had made the requisite showing, *see Fireman's Fund Ins. Co. v. Leslie & Elliot Co.*, 867 F.2d 150, 151 (2d Cir. 1989), the court issued a preliminary injunction.

In an effort to ensure the constitutionality of the injunction, the district court carefully reviewed the terms of the injunction pursuant to relevant First Amendment considerations. The court noted that the then-prevailing test for restrictions on the time, place and manner of expression required that the restriction be content neutral and narrowly tailored to serve a significant government interest, and that it leave open ample alternative channels of communication. *Pro-Choice I*, 799 F.Supp. at 1432 (citing *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)).

Applying this test, the court first found that the preliminary injunction was content neutral because it "makes no mention whatsoever of abortion or any other substantive issue" and regulates only "when, where and how defendants may



speak." *Id.* at 1433. The court also found that the injunction would apply equally to people protesting or supporting abortion and to demonstrators for or against other causes, a finding vigorously contested by Project Rescue.

The court then determined that the injunction served three significant government interests: (1) the interest in ensuring that abortions are performed safely; (2) the interest in public safety; and (3) the interest in ensuring that the constitutional rights of one group are not sacrificed for the constitutional rights of another group. *Id.* The court found that the injunction was narrowly tailored to meet these interests. Finally, the court determined that the injunction provided Project Rescue sample alternative avenues of communication because it allowed Project Rescue to engage in many demonstration activities outside the fifteen foot clear zone. *Id.* at 1437.

Two individual defendants, Paul Schenck and Dwight Saunders,[3] appealed from the district court's order issuing the preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). During the pendency of the appeal, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, ___-___, 113 S.Ct. 753, 759-60, 122 L.Ed.2d 34 (1993), holding that a section 1985(3) claim, which requires a showing of some invidiously discriminatory, class-based animus, could not be sustained where the only class-based animus alleged was animus against women as evidenced by opposition to abortion.

Project Rescue thereafter moved in the district court for dismissal of the complaint and for vacatur of the injunction,

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[3] For convenience, we will refer to these appellants, as well as the appellants in *Pro-Choice II*, collectively as "Project Rescue."

contending [366] that *Bray* compelled the dismissal of Pro-Choice's section 1985(3) claim and that, after dismissal of that sole federal claim, dismissal of the pendent state claims and vacatur of the injunction were also warranted. By stipulation of the parties, the appeal from the issuance of the injunction was dismissed without prejudice to reinstatement by any party within twenty days of the district court's resolution of the motion to dismiss the claims and to vacate the injunction. See *Pro-Choice II*, 828 F.Supp. at 1028 n. 9.

The district court granted Project Rescue's motion in part, dismissing the section 1985(3) claim with leave to amend the complaint, but refused to dismiss the state law claims or to vacate the injunction. In refusing to vacate the injunction, the court stated that "[t]he Court's decision to exercise pendent jurisdiction over the state-law claims, regardless of the ultimate disposition of the § 1985(3) claim, leaves without question the viability and continued enforceability of the preliminary injunction." *Pro-Choice II*, 828 F.Supp. at 1032. Project Rescue subsequently appealed from the district court's refusal to vacate the injunction, *see* 28 U.S.C. § 1292(a)(1), and the appeal from the issuance of the injunction was reinstated.

Because they arise from the same underlying case, we consider Project Rescue's two appeals together. In the appeal relating to the issuance of the injunction, No. 92-7302, Project Rescue contends that: (1) no injunction is permitted under section 1985(3); and (2) the injunction unconstitutionally restricts expression that is protected by the First Amendment. Project Rescue does not challenge the portion of the injunction that prohibits it from physically blockading the abortion clinics. In the appeal relating to the district court's denial of the motion to vacate the injunction, No. 93-7918, Project Rescue contends that: (1) no injunction is permitted under section 40-c and the



restrictions on expression imposed by the injunction exceed that permitted pursuant to the state law trespass claim; (2) the district court should have limited the injunction's contempt fines to the amount allowed under New York law; and (3) the court should have abstained from adjudicating this case.

After oral argument in these cases, the Supreme Court decided *Madsen v. Women's Health Center*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), in which the Court approved in part and disapproved in part an injunction prohibiting abortion opponents from engaging in certain activities near an abortion clinic in Melbourne, Florida. We allowed the parties to submit letter briefs addressing the effect of *Madsen* on the issues before us.[4]

## Discussion

### I. *Standing*

[1] Project Rescue contends that Pro-Choice lacks standing to seek an injunction against Project Rescue's activities. The basis of Project Rescue's argument is the novel proposition that an injunction restraining the time, place and manner of protected expression is inappropriate in cases involving private litigants because only government interests can justify such an injunction. Project Rescue maintains that Pro-Choice, a private entity, has standing to assert only its own private interests and, therefore, cannot assert the government interests required to

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[4] In its letter brief, Project Rescue challenged, for the first time, the validity of the injunction's civil contempt provisions, arguing that any violation of the injunction should be treated as criminal, rather than civil, contempt. This issue is not properly before us on this appeal and we do not consider it.

support a restraint on expression. We reject Project Rescue's contention because it improperly collapses two distinct issues: whether a litigant has standing to assert certain substantive claims against another party and whether an injunction restricting activity protected by the First Amendment is warranted.

Here, Pro-Choice had standing to assert its claims against Project Rescue because Pro-Choice alleged in its complaint that Project Rescue's activities caused Pro-Choice to suffer a concrete injury, that there was an immediate threat that Project Rescue would continue its allegedly injurious activities, and that the injuries were likely to be redressed [367] by injunctive relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 110-11, 103 S.Ct. 1660, 1669-70, 75 L.Ed.2d 675 (1983). Having thus established its standing to maintain its claims against Project Rescue, Pro-Choice was entitled to argue that injunctive relief was a proper remedy because certain government interests would be furthered by the issuance of such relief. Project Rescue's standing argument thus fails.

II. *Abstention*

[2] Project Rescue contends, in its appeal from the district court's refusal to vacate the injunction, that the court should have abstained from adjudicating this case in deference to an identical, ongoing state court proceeding. This claim, however, is not properly before us. Indeed, Project Rescue did not seek to raise the abstention issue in the district court as part of the motion to dismiss and to vacate. Moreover, because the district court did consider the abstention issue in the course of granting the preliminary injunction, *see Pro-Choice I*, 799 F.Supp. at 1439, Project Rescue could have challenged the



district court's decision not to abstain in its appeal from the issuance of the preliminary injunction. Having failed to do that, Project Rescue has waived its challenge to the district court's refusal to abstain.

[3] Furthermore, we reject Project Rescue's challenge, raised in the midst of its "abstention" claim, to the district court's decision not to relinquish jurisdiction over the pendent state law claims even after dismissing the only federal claim. The district court carefully and thoroughly analyzed the appropriate considerations, *Pro-Choice II*, 828 F.Supp. at 1027-32, and its determination to retain jurisdiction over the pendent state law claims accords with the governing case law. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 & n.7, 108 S.Ct. 614, 618-19 & n.7, 98 L.Ed.2d 720 (1988); *Enercomp, Inc. v. McCorhill Publishing*, 873 F.2d 536, 545-46 (2d Cir. 1989).

III. *Scope of the Injunction*

Project Rescue wages several attacks on the scope of the injunction. First, it alleges that the district court erred in refusing to vacate the preliminary injunction because (a) the injunction imposes impermissibly high contempt fines, (b) the injunction's substantive restrictions on expression go beyond that which is permissible to redress repeated trespasses, and (c) the section 40-c claim no longer states a claim upon which relief can be granted. Second, Project Rescue contends that the district court erred in issuing the injunction because (a) certain provisions violate the First Amendment, and (b) certain provisions are vague and, therefore, violate due process. Finally, Project Rescue asserts a variety of additional contentions challenging the validity of the injunction. We address Project Rescue's claims in turn.

A. *State Law Limits on Injunction*

[4] Project Rescue contends that several aspects of the injunction exceed that which is permissible pursuant to New York law. First, Project Rescue asserts that the contempt fines prescribed in the injunction are higher than is allowable pursuant to New York state law. Project Rescue also contends that, because section 40-c does not authorize injunctive relief and the only permissible basis for the injunction is, therefore, the trespass claim, the case must be remanded to the district court to allow appropriate "tailoring" of the injunction to the trespass claim. Project Rescue further claims that, after *Bray*, the section 40-c claim no longer states a claim upon which relief can be granted and, therefore, that the injunction is improper. We decline to address the merits of any of these contentions for the reasons that follow.

In the district court, Project Rescue sought the vacatur of the preliminary injunction on the ground that the sole federal claim should be dismissed, that the pendent state law claims should then also be dismissed because the exercise of pendent jurisdiction would be improper after dismissal of the federal claim, and that, with no claim remaining in the case, the injunction should be vacated. Project Rescue did not, however, **[368]** assert in the alternative that the district court should modify the injunction to reduce the contempt fines or to limit it to the trespass claim alone, or that the court should dismiss the section 40-c claim for failure to state a claim. Project Rescue thus gave the district court no reason to consider, in the course of making its decision on the motion to vacate, the claims that it now asserts. In our view, the district court should have the first opportunity to determine, on proper application of the parties, both whether the injunction exceeds its state law basis and whether, if so, other state law or federal law bases exist for this injunction. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994). Accordingly, we do not address Project Rescue's state law challenges to the injunction and do not disturb, on any of those grounds, the district court's refusal to vacate the injunction.



B. *Constitutional Limits on Injunction*

1. *First Amendment*

[5] Project Rescue's next claim regarding the scope of the injunction is that certain provisions infringe on its First Amendment right to freedom of speech.[5] For the reasons stated below, we conclude that, with two exceptions, the provisions of the preliminary injunction comply with the First Amendment.

Pro-Choice properly acknowledges that the challenged provisions of the preliminary injunction reach both expressive conduct, such as demonstrating and picketing, and speech that the First Amendment protects. *See Frisby*, 487 U.S. at 479, 108 S.Ct. at 2499 (ordinance that prohibits picketing on an issue of public concern "operates at the core of the First Amendment");

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5 As part of its First Amendment challenge to the preliminary injunction, Project Rescue contends that the injunction constitutes a prior restraint and that, as such, it is presumptively unconstitutional. The Supreme Court recently disposed of this argument, holding that a content neutral injunction that restricts, but does not absolutely bar, particular expression is not a prior restraint. *See Madsen*, ___ U.S. at ___ n.2, 114 S.Ct. at 2524 n.2 (citing *Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (per curiam); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)). Because, as discussed below, the injunction in this case is content neutral and is not an absolute bar on particular expression, it is not an invalid prior restraint.

*Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981) (oral and written expressions of religious views fall within protection of First Amendment); *see also Pro-Choice I*, 799 F.Supp. at 1432 ("[t]here is no question that defendants' activities constitute a form of political speech protected by the First Amendment"). Moreover, the injunction reaches constitutionally protected expression in a traditional public forum: public sidewalks. *Frisby*, 487 U.S. at 480, 108 S.Ct. at 2500; *United States v. Grace*, 461 U.S. 171, 177-80, 103 S.Ct. 1702, 1706-09, 75 L.Ed.2d 736 (1985); *Heffron*, 452 U.S. at 651, 101 S.Ct. at 2565-66; *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *see also Pro-Choice I*, 799 F.Supp. at 1432.

[6] Crucial to our review of the constitutionality of the preliminary injunction is the determination whether it is content based or content neutral, that is, whether it is justified with or without references to the content of the regulated expression. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82, 384-86, 112 S.Ct. 2538, 2542, 2544, 120 L.Ed.2d 305 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-54, 105 L.Ed.2d 661 (1989). In making this determination, "we ... look to the government's purpose as the threshold consideration." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2523.

[7] Contrary to Project Rescue's contention, the injunction is not properly considered content based merely because it applies to abortion opponents and not to abortion rights supporters. The Supreme Court recently stated that the fact "[t]hat petitioners all share the same view point regarding abortion does not in itself demonstrate that some invidious content-or viewpoint-based purpose motivated the issuance of the



[injunctive] order." *Id.* (emphasis added); *see also* [369] *New York State Nat'l Org. for Women*, 886 F.2d at 1363. Rather, the injunction was imposed on Project Rescue because it was creating the threat of irreparable injury to women seeking abortions. *See Pro-Choice I*, 799 F.Supp. at 1428; *see also Madsen*, ___ U.S. at ___, 114 S.Ct. at 2523.

[8] Our inquiry into whether the injunction in this case is content based or content neutral does not end here, however, because we must still determine whether the justifications underlying the issuance of the injunction refer to the content of the restricted expression. *See R.A.V.*, 505 U.S. at 384-86, 112 S.Ct. at 2544; *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753-54. One justification cited by the district court was that women seeking services at the plaintiff facilities would be denied unimpeded access to those services in the absence of a preliminary injunction restraining Project Rescue's activities. *Pro-Choice I*, 799 F.Supp. at 1428. The district court also justified the injunction on the ground that, without an injunction, prospective patients at the facilities, as well as staff members would suffer adverse effects, especially stress and anxiety, from Project Rescue's activities, causing an increase in the risks associated with the abortion procedure. *Id.* Because the purpose of ensuring access to services at the facilities does not refer to the content of the restricted expression and, therefore, constitutes a valid basis for the injunction, we need not determine whether the purpose of avoiding stress and anxiety to patients is itself content based.

[9] We note, however, that a government regulation of expression is considered content based if it seeks to prevent the listeners of that expression from being offended by the message. *See Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988). On the other hand, a government

regulation of expression would probably be considered content neutral if its purpose is to avoid a violent audience reaction to the message. *See Texas v. Johnson*, 491 U.S. 397, 407 n.4, 109 S.Ct. 2533, 2541 n.4, 105 L.Ed.2d 342 (1989). To the extent that, in this case, an injunction's purpose of avoiding stress to prospective clinic patients is closer to avoiding offense, *see Boos*, 485 U.S. at 321, 108 S.Ct. at 1163-64, than to avoiding violence, *see Johnson*, 491 U.S. at 407 n.4, 109 S.Ct. at 2541 n.4, that purpose might constitute a justification that impermissibly refers to content. We do not decide this issue, however, because the injunction here is validly based on the content neutral purpose of ensuring access to services at facilities where abortions are performed.

We now proceed to apply the Supreme Court's newly enunciated test for determining the constitutionality of content neutral injunctions restricting expression in a public forum: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. As explained by the Court, this new test is more rigorous than the traditional test that has been applied to regulations of the time, place and manner of expression. *See, e.g., Clark*, 468 U.S. at 293, 104 S.Ct. at 3069 (holding that test for time, place and manner restrictions is whether the restriction is content neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication). More searching scrutiny of content neutral injunctions restricting expression, as opposed to content neutral legislation restricting expression, is appropriate because of the "greater risks of censorship and discriminatory application" associated with injunctions and the "'effective practical guaranty against arbitrary and unreasonable government'" inherent in legislation that is to be generally applied. *Madsen*, ___ U.S. at ___, 114 S.Ct. at



2524 (quoting *Railway Express Agency v. New York*, 336 U.S. 106, 112-13, 69 S.Ct. 463, 466-67, 93 L.Ed. 533 (1949)).

[10] In applying the *Madsen* test, we first analyze whether the government interests identified by the district court--safe performance of abortions, public safety, and protection of one group's constitutional rights without sacrificing another group's constitutional rights--are significant. We conclude that they are. As the Court recognized in *Madsen*, the government has strong interests both "in ensuring the public safety and order" and "in protecting a woman's freedom [370] to seek lawful medical or counseling services in connection with her pregnancy." *Id.* at ___, 114 S.Ct. at 2526. Moreover, it is axiomatic that the government has a significant interest in protecting the constitutional rights of all persons and groups. Accordingly, the government interests identified by the district court are "quite sufficient to justify an appropriately tailored injunction to protect them." *Id.*

[11] We now examine each of the challenged provisions of the injunction to determine whether, under the *Madsen* test, it passes First Amendment muster. First, Project Rescue challenges the establishment, in paragraph 1(b) of the injunction, of a fifteen foot "bubble zone" around facilities in the Western District of New York at which abortions are performed. The bubble zone provision prohibits all demonstrations within fifteen feet of such facilities' doorways, doorway entrances, driveways, driveway entrances, and parking lot entrances; it also prohibits any demonstrations within fifteen feet of any person or vehicle seeking access to the clinics. The injunction allows two demonstrators, however, to enter the bubble zone for the exclusive purpose of engaging in sidewalk counseling, which is characterized as a non-threatening conversation with a

prospective clinic patient seeking to persuade the patient not to have an abortion.

In determining whether the bubble zone provision "burden[s] no more speech than necessary," *id.* at ___, 114 S.Ct. at 2525, to serve the identified significant government interests, we note first that the bubble zone does not effect a complete ban on all expression within the zone; rather, the injunction permits a limited exception for two persons at a time to enter the bubble zone for the purpose of engaging in sidewalk counseling, until such time as the person being counseled indicates a desire that the counseling cease. Moreover, the radius of the bubble zone is the relatively short distance of fifteen feet. *Cf. id.* at ___, 114 S.Ct. at 2527 (upholding thirty-six foot bubble zone around abortion clinic property).

On the other hand, we must recognize that the bubble zone constitutes a substantial restriction on Project Rescue's activities. Because other provisions of the injunction restrain Project Rescue from obstructing or in any way impeding access to the clinics, parking lots and driveways, the bubble zone provision apparently forbids conduct even beyond that which would obstruct or impede access. For example, as we read the injunction, the bubble zone provision prohibits a defendant from standing on a sidewalk in front of the clinic, within fifteen feet of the entrance, holding a sign imprinted with an antiabortion message.

Moreover, the need for this prohibition, which goes beyond preventing the obstruction of access, is not established on this record. As noted by the district court, Project Rescue complied with the TRO by refraining from engaging in physical blockades of the clinics. Although approximately six individuals were held in civil contempt for violating the TRO by engaging in such conduct as impeding and hindering access to the facilities



or upsetting prospective patients, *see Pro-Choice III*, 994 F.2d at 992-93, it appears from the record that, of these individuals, only some had engaged in obstructive activities. Without more evidence of Project Rescue's disregard for the court's order to refrain from obstructing or impeding access, we are reluctant to approve a restriction of First Amendment rights such as that effected by the bubble zone provision.[6]

The Supreme Court's analysis of the thirty-six foot buffer zone at issue in *Madsen* provides an instructive contrast. There, an injunction established an absolute ban on "congregating, picketing, patrolling, demonstrating or entering" any property within thirty-six feet of the clinic's property line. The Court noted that "[t]he state court [that issued the injunction] was convinced that allowing the petitioners to remain on the clinic's [371] sidewalk and driveway was not a viable option in view of the failure of the first [less restrictive] injunction to protect access." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2527 (emphasis added). The Court further stated that "[w]e ... bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic." *Id.* (emphasis added). Here, by contrast, there is no indication that the TRO violations were so pervasive as to undermine the district court's general goal of ensuring access to abortion facilities.

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[6] Although Pro-Choice has brought to our attention several instances of violations of the preliminary injunction, resulting in criminal contempt convictions, we note that such evidence is outside the record to which we may look for support for the preliminary injunction. The district court could, however, consider such evidence now in response to any motion the parties might make regarding the current scope of the injunction's prohibitions.

We conclude here that, unless and until the record supports a finding that he prohibition against obstructing or impeding access to the facilities is ineffective to protect access, the bubble zone provision does not pass constitutional muster. Accordingly, the bubble zone provision imposed in paragraph 1(b) of the injunction sweeps to broadly and burdens more of Project Rescue's constitutionally protected expression than is necessary to protect the government's significant interests in the safe performance of abortions, in public safety and in protecting all persons' constitutional rights. Our holding is limited, however, to the factual record before us; a different record revealing greater intransigence by Project Rescue might well support a more restrictive injunction, as in *Madsen*.

[12] Project Rescue also challenges the so-called cease and desist requirement imposed in paragraph 1(c). That provision states that "no one is required to accept or listen to sidewalk counseling, and ... if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling." Although we approved a nearly identical restriction in *New York State Nat'l Org. for Women*, 886 F.2d at 1363-64, we must revisit this issue in light of the Supreme Court's intervening decision in *Madsen*.

The *Madsen* Court struck down a provision in the injunction at issue there that required the defendants, when located within 300 feet of the abortion clinic, to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate.'" ___ U.S. at ___, 114 S.Ct. at 2529 (quoting injunction). Treating this "no approach" provision as implicating expressive activities



protected by the First Amendment, *cf. id.* at ___-___, 114 S.Ct. at 2532-33 (Stevens, J., concurring in part and dissenting in part) (sidewalk counseling is a mixture of conduct and expression), the Court held that "it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at ___, 114 S.Ct. 2529.

The cease and desist provision challenged here is somewhat less restrictive than the no approach provision in *Madsen* because it does not completely prohibit sidewalk counselors from initiating contact with persons entering the clinics. This distinction is not dispositive, however, because both the cease and desist provision here and the no approach provision in *Madsen* operate to allow the prospective counselee to control the prospective counselor's opportunity to engage in protected expression.[7] The provisions are thus equally restrictive of the communication offered by the counselors; both effectively condition the demonstrator's right to engage in protected expression on another person's wish to hear such expression. Although the prospective counselee need not listen to the counselor, she does not have the right to stop the counselor's communication, absent any evidence that the communication is independently proscribable, *see id.*, or that the counselor is engaging in pure conduct that is not protected by the First Amendment. *Cf. id.* at ___, 114 S.Ct. at 2533 (Stevens, J., concurring in part and dissenting in part). Like the no approach provision [372] in *Madsen*, the cease and desist provision at issue here thus violates the established principle that

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[7] As noted above, Pro-Choice has not disputed that sidewalk counseling is expressive activity entitled to full First Amendment protection.

"in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos*, 485 U.S. at 322, 108 S.Ct. at 1164 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988)). Accordingly, we conclude that the cease and desist provision in paragraph 1(c) burdens more speech than necessary to serve the identified government interests.

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[13] Project Rescue next challenges the prohibition in paragraph 1(e) against "inducing, directing aiding, or abetting in any manner, others to take any of the [enjoined] actions." Project Rescue contends that this provision violates the First Amendment's protection of free speech because it reaches beyond expression that is likely to produce "imminent lawless action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28, 102 S.Ct. 3409, 3433, 73 L.Ed.2d 1215 (1982). We are not persuaded.

This contention confuses the inquiry as to whether certain speech is entitled to First Amendment protection, the issue raised in *Claiborne Hardware*, with the inquiry as to whether constitutionally protected speech may permissibly be restricted. Indeed, assuming that the challenged restrictions in paragraph 1(e) reach constitutionally protected expression, we must still determine whether the injunction's regulation of that protected expression is justified under the circumstances presented. Because it could not be invalid to prohibit the inducement, direction, aiding or abetting of protected expression that is itself validly prohibited, we conclude that the restriction in paragraph 1(e) as it applies to the valid provisions of the injunction is justified.

[14] Finally, Project Rescue challenges the injunction's requirement that it make a "good faith effort to instruct all



organizations and individuals [it] believes to be planning to participate in any of the [enjoined] activities ... not to engage or participate in [those] activities." Project Rescue contends that this provision is invalid because it forces Project Rescue to engage in speech repugnant to its views. We disagree. Our decision in *New York State Nat'l Org. for Women*, 886 F.2d at 1352, is dispositive of this contention. There, we held that a leader of an antiabortion group could properly be held in contempt for "fail[ing] to instruct his followers that the TRO prohibited their goal of blocking entry to facilities providing abortion services." *Id.* In accordance with that holding, we reject Project Rescue's challenge to the "good faith effort" provision as that provision applies to the valid provisions of the injunction.

### 2. *Due Process*

Project Rescue further contends that certain provisions of the injunction are impermissible vague. We disagree.

[15][16] "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). Although most void-for-vagueness challenges target municipal ordinances, criminal statutes and other generally applicable laws, *see, e.g., Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) (criminal statute); *Village of Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, 491, 102 S.Ct. 1186, 1190, 71 L.Ed.2d 362 (1982) (village ordinance); *United States v. Sun and Sand Imports*, 725 F.2d 184, 186-87 (2d Cir. 1984) (federal regulation), Project Rescue's vagueness challenge to the injunction is nonetheless proper because an unclear injunction, like unclear legislation, "may trap

the innocent by not providing fair warning" of what is prohibited. *See Grayned*, 408 U.S. at 108, 92 S.Ct. at 2299. Moreover, injunctions pose a particular risk of discriminatory application, *see Madsen*, ___ U.S. at ___, 114 S.Ct. at 2524, and that risk constitutes yet another reason to require clear and definite notice of what is prohibited. *See Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298-99.

[17][18][19] A regulation is void for vagueness if it is so indefinite that ordinary people cannot understand that which it prohibits. **[373]** See *Kolender*, 461 U.S. at 357, 103 S.Ct. at 1858. Moreover, if the regulation does not include minimal guidelines to govern its enforcement, it is impermissibly vague. *Id.* at 358, 103 S.Ct. at 1858. Finally, if an injunction implicates fundamental rights, the reviewing court must insist on strict compliance with the requirement of clarity. *Cf. Village of Hoffman Estates* 455 U.S. at 498, 102 S.Ct. at 1193 ("[t]he degree of vagueness that the Constitution tolerates ... depends in part on the nature of the enactment," and economic regulations are subject to more lenient vagueness test).

[20] First, Project Rescue contends that the prohibitions on "touching" and "crowding" in paragraph 1(c) are unconstitutionally vague. The word "touching" is, however, sufficiently clear to allow ordinary persons to understand what is prohibited. Moreover, although the meaning of the word "crowding" is somewhat less clear than the meaning of "touching," we believe that, in the context of paragraph 1(c)'s other prohibitions, the "crowding" restriction is not impermissibly vague.

[21] Project Rescue also cites the prohibition on "excessively loud sound[s]" in paragraph 1(d) as vague. This provision, however, is accompanied by a definitional clause that



makes clear that an "excessively loud sound" is one that "injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed." The noise restriction, therefore, is valid.

[22] Project Rescue further asserts that the injunction is vague because it is impossible for Project Rescue to identify the clinic staff and patients who are protected under the terms of the injunction. Project Rescue need not, however, identify those persons who are clinic staff members or patients in order to bring its activities into compliance with the injunction. Paragraphs 1(b) and 1(c) refer only to "any person ... seeking access to or leaving such facilities." (emphasis added). Moreover, paragraph 1(d) prohibits noises that injure, disturb or endanger the health or safety of "any patient or employee of a health care facility at which abortions are performed." This provision does not require Project Rescue to identify individual patients or employees and then to make a particularized assessment regarding the noise level that is permissible as to that person. Rather, Project Rescue must keep its noise levels low enough that they do not injure, disturb or endanger the health of all patients and staff members inside or outside the facilities. Accordingly, these provisions are also sufficiently definite to defeat Project Rescue's vagueness challenge.[8]

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[8] Project Rescue also presents an "overbreadth" challenge to paragraphs 1(b), 1(c) and 1(d) of the injunction. Project Rescue asserts that these provisions are "overbroad" because they are not narrowly tailored. We view this argument as referring to the traditional test for time, place and manner restrictions on expression, the test that was recently replaced by a more stringent test for content neutral injunctions restricting expression. *See Madsen*, ___ U.S. at ___, 114 S.Ct. at 2525. Because we have applied the new *Madsen* test here, we do not specifically address Project Rescue's overbreadth challenge.

C. *Other Challenges*

[23] Project Rescue also contends that the injunction's prohibition against trespassing on the facilities' parking lots, parking lot entrances, driveways and driveway entrances is redundant and unnecessary because state trespass laws reach such conduct. This contention is essentially an objection to the district court's determination that women seeking abortions will be denied access to the plaintiff facilities if an injunction prohibiting such trespasses does not issue. Project Rescue has, however, given us no reason to believe that the district court's determination was erroneous. Indeed, the determination is supported by facts in the record, facts that are themselves not challenged by Project Rescue. For example, the district court found that the defendants often congregate at or near the driveway entrances and that they thereby succeed in impeding access to the clinics. *Pro-Choice I*, 799 F.Supp. at 1424. Moreover, the court found a threat of continuing trespasses. *Id.* at 1432. Project Rescue's contention therefore fails.

[24] Finally, Project Rescue contends that private property owners, such as the [374] plaintiff facilities, cannot properly assume regulatory control over government property. While this proposition is undoubtedly true, it is inapposite here, where the district court, not the plaintiff facilities, issued the injunction restricting Project Rescue's activities on public property.

IV. *Summary*

To summarize, we uphold all challenged portions of the preliminary injunction except (1) the provision in paragraph 1(b) prohibiting "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking



lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities," and (2) the provision in paragraph 1(c) providing that "no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling." We strike down those two provisions as unconstitutional because they burden more speech than necessary to serve the identified significant government interests.

Conclusion

In *Pro-Choice I*, we affirm in part and reverse in part the order issuing the injunction. In *Pro-Choice II*, which does not involve the First Amendment issues, we affirm the order denying the motion to vacate the injunction.

OAKES, Senior Circuit Judge, (dissenting):

While I agree with the greater part of the majority's ruling, I disagree as to two points: I believe that both the fifteen-foot "bubble zone" and the cease and desist order are necessary under the circumstances of this case to ensure the health and safety of the patients receiving abortions at the clinics. Both provisions further the significant government interest in the safe performance of abortions, and in light of the past behavior of the Project Rescue protesters, the provisions burden no more speech than necessary, and, consequently, do not violate the First Amendment. I will address each provision separately.

I. *The Bubble Zone*

*Madsen v. Women's Health Ctr., Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) requires that the injunction "burden no more speech than necessary to serve a significant government interest." *Id.* at ___, 114 S.Ct. at 2519. I agree with the majority that all three of the government interests identified by the district court are indeed significant: 1) the safe performance of abortions, 2) public safety, and 3) protection of one group's constitutional rights without sacrificing another group's constitutional rights. *See ante* pp. 141-42. The question, therefore, is whether the so-called bubble zone burdens more speech than necessary to serve those interests. The majority concludes that it does, based, first, on the fact that other provisions of the injunction restrain Project Rescue from obstructing or impeding access to the clinics, parking lots and driveways, *ante* p. 142, and, second, on its conclusion that the record does not reflect a need to impose restrictions beyond those other provisions. *Ante* p. 143.

In my view, although the other provisions in the injunction do much to promote free access to abortions, they fall short of what is required to ensure that abortions are safely performed at facilities in the Western District of New York. At least we must accord the district court's findings and conclusions to that effect much weight. There is ample evidence in the record of the health risks faced by women who are targets of the "sidewalk counseling" and other Project Rescue demonstrations. After an extensive evidentiary hearing the district court found that in addition to physically blocking access to the clinic, "[t]he demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner ... This activity causes stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupts the [375]



atmosphere necessary for rendering safe and efficacious health care." *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1424 (W.D.N.Y. 1992); *see also ante* p. 136. The district court also found that women who suffer from stress and anxiety caused by confrontations with the protesters run an increased risk of complications associated with abortions. *Pro-Choice Network*, 799 F.Supp. at 1427; *see also ante* p. 136.

These health risks are caused by actions of the protesters that go far beyond the physical barricading of the clinic entrances, parking lots and driveways. The bubble zone would prevent the protesters from harassing patients at a physically close range and from swarming around patients in large groups as they approach the clinic. Face-to-face confrontation such as this presents a risk of duress that is "an appropriate target of regulation." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. ___, ___, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992).

The district court determined that the fifteen-foot bubble zone was necessary to ensure that abortions performed at the clinic are without undue health risks to the patients. "[S]ome deference must be given to the [district] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2549.

The majority suggests that even if the district court believed that the bubble zone was warranted to further significant government interests, it should first have imposed a narrower injunction without a bubble zone to determine whether a less restrictive solution would be sufficient. *Ante* p. 143. This iterative process seems to me unwise and not required by

*Madsen*. The *Madsen* Court examined the facts present in that case in order to determine whether the buffer zone was necessary. *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2526-27. One factor in the Court's analysis was that a less restrictive injunction had proved ineffective. *Id.* The Court did not state or even imply that this factor need be present in order for a buffer zone or its equivalent to be a necessary remedy. Requiring the district court to impose a less restrictive injunction than the one the court found necessary is inefficient and perhaps dangerous. While the district court waits for the injunction to prove ineffective, patients may well continue to suffer the extreme stress and anxiety that causes the increased health risks associated with abortions.

In the case before us, the past actions of the protesters justify the imposition of the bubble zone. At least six of the defendants violated the temporary restraining order imposed by the district court. *Ante* p. 143. Further, many of the sidewalk counselors and other defendants were arrested for harassment on more than one occasion, yet they continued to harass and intimidate patients, patient escorts and clinic staff. *Pro-Choice Network*, 799 F.Supp. at 1425.

The bubble zone would burden the least speech necessary to further the goal of ensuring the safe performance of abortions. The bubble zone is much less restrictive than the buffer zone upheld in *Madsen*. The bubble zone prohibits the protesters from demonstrating within fifteen feet of clinic entrances and driveways, or within fifteen feet of persons entering a clinic, as compared with the buffer zone in *Madsen* which extended thirty-six feet from clinic property. In addition, unlike the buffer zone in *Madsen*, the bubble zone does not prevent the protesters from expressing their views inside the fifteen-foot radius. Importantly, two representatives of the demonstrators are



allowed to enter the zone to "counsel" patients. The small size of the zone ensures that the patients, patient escorts and clinic staff inside the zone will hear anything said by the demonstrators at the edge of the zone and see any signs or pictures displayed by the demonstrators. *Cf. Madsen*, ___ U.S. at ___, 114 S.Ct. at 2549 ("Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots"). Hence, the district court carefully designed the zone to allow Project Rescue effectively to communicate its views to the patients and staff of the clinic while ensuring [376] that the patients are not so overwhelmed as to jeopardize their well-being. I would, therefore, uphold that portion of the injunction.

II. *The Cease and Desist Order*

The Court in *Madsen* struck down a provision that prohibited demonstrators from approaching patients within 300 feet of the clinic unless the patients affirmatively requested to communicate with the demonstrators. *Id.* at ___-___, 114 S.Ct. at 2528-30. The cease and desist provision in this case is much less restrictive than that "no approach" provision. The cease and desist order provides that if a patient does not want to be counseled, the protesters must cease their attempts at counseling that person. This provision allows people who are the targets of focused counseling efforts by the protesters to walk away from the counseling. The purpose of the provision, like that of the bubble zone, is to reduce the potentially harmful stress and anxiety experienced by the patients who are forced to pass through the demonstrators in order to avail themselves of clinic services.

In striking down this provision, the majority relies on a proposition articulated by the Court in *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988)

(quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988)), that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Ante* p. 144 (internal quotation marks omitted). In *Boos*, the statute at issue prohibited any person from displaying a sign outside an embassy that tended to bring the foreign government into "public odium." *Boos*, 485 U.S. at 316, 108 S.Ct. at 1161. In striking down the statute, the Court held that foreign diplomats would have to suffer those indignities. *Id.* at 329, 108 S.Ct. at 1168. The *Hustler* case involved a libel claim by a minister over a parody in a magazine. *Hustler*, 485 U.S. at 48, 108 S.Ct. at 878. The Court held, similarly, that even "outrageous" caricatures must be tolerated in the interest of freedom of expression. *Id.* at 55, 108 S.Ct. at 881-82.

This case involves countervailing concerns not present in *Boos* or *Hustler*. Focused picketing is fundamentally different from generally disseminated communication that cannot be banned from public places. *Madsen*, ___ U.S. at ___, 114 S.Ct. at 2527 (citing *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). This case is analogous to *Frisby*, in which the Court upheld an ordinance that prohibited picketing in front of or around an individual residence. *Id.* at 488, 108 S.Ct. at 2504. The Court reasoned that people are captive audiences inside their homes, and in the interest of residential privacy, the Court allowed the ban on picketing. *Id.*; *cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 94 S.Ct. 2714, 2718, 41 L.Ed.2d 770 (1974) (upholding regulation of advertisement on mass transit because riders were captive audience); *Cameron v. Johnson*, 390 U.S. 611, 622, 88 S.Ct. 1335, 1341, 20 L.Ed.2d 182 (1968) (upholding statute prohibiting picketers from blocking entrance to and egress from courthouse). Women who want



abortions have no choice but to brave the demonstrations en route to the clinics. They are, in effect, a captive audience to the messages of the protesters.

The cease and desist provision burdens no more speech than necessary. The provision does not prevent the protesters from expressing their views. They can approach and attempt to counsel patients, escorts and staff. The provision only prevents the protesters from persistently badgering people at a close range. The protesters would still be able to communicate their views to the patients, escorts and staff, who would still be forced to hear and see the protest, no matter how insulting or offensive.

III. *Conclusion*

Because I believe both the bubble zone and the cease and desist order are necessary for the injunction to fully effectuate its goals, I [377] would uphold those portions of the injunction.

## APPENDIX C

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group,**

**Plaintiffs-Appellees,**

**v.**

**Nancy WALKER, Defendant-Appellant, Project Rescue Western New York, Operation Rescue, Project Life of Rochester, Rev. James L. Evans, Rev. Paul Schneck, Rev. Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Rev. Daniel Hamlin, James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmilller, Jr., Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Does, Jane Does, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,**

**Defendants.**



**PRO-CHOICE NETWORK OF WESTERN NEW YORK, Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortmann, M.D., Highland Obstetrical Group, and Alexander Women's Group,**

**Plaintiffs-Appellees,**

**v.**

**Bonnie BEHN and Carla RAINERO,**

**Defendants-Appellants,**

**Project Rescue Western New York, Operation Rescue, Project Life of Rochester, Paul Schenk, James L. Evans, Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Daniel Hamlin, Donna Johanns, James Handyside, Pamela Huffnagle, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Does, Jane Does, the last two being fictitious names, the real names of said defendants being presently unknown to palintiffs, said fictitious names being intended to designate orgnaizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein,**

**Defendants.**

**Nos. 692, 691, Dockets 92-7854, 92-7954.**

Untied States Court of Appeals,
Second Circuit.

Argued Dec. 15, 1992.

Decided May 26, 1993.

**[990]**[1] James J. Duane, Virginia Beach, VA, for appellants.

Lucinda M. Finley, Buffalo, NY, for appellees.

Before: MESKILL, Chief Judge, NEWMAN and JACOBS, Circuit Judges.

MESKILL, Chief Judge:

These two appeals involve contempt judgments resulting from violations of the same Temporary Restraining Order (TRO) issued by Judge Arcara on September 27, 1990. We address both appeals together because of their factual similarity and identical legal issues.

Appellant Nancy Walker appeals a judgment of the United States District Court for the Western District of New York, Arcara, J., entered on July 28, 1992 which granted

[1] Bracketed numbers in bold type indicate page numbers from decision reported at 994 F.2d 989 (2d Cir. 1993).



the plaintiffs-appellees' (Pro-Choice Network's)[1] petition for civil contempt against her and imposed $10,000 in civil damages and a $20,000 fine. The court directed the Clerk to enter judgment against Walker in the amount of $10,000 to be paid to two of the plaintiffs; the remaining $20,000 was made contingent upon any future violations of the preliminary injunction.

Appellants Bonnie Behn and Carla Rainero appeal a judgment of the same court entered on August 14, 1992 which granted Pro-Choice Network's petition for civil contempt against them, entered judgment against them in the amount of $10,000 each and granted Pro-Choice Network's request for reasonable attorney's fees and costs associated with prosecuting the contempt.

Although the district judge labeled the contempt proceedings civil, appellants argue that the unconditional fines he imposed are immediately appealable as orders of criminal contempt because they were neither compensatory nor coercive. They also contend that, as to each of them, the district court's findings of civil contempt by clear and convincing evidence were clearly erroneous. Walker **[991]** also argues that the portions of the TRO she allegedly violated were not legally valid because

[1] Plaintiffs-appellees are Pro-Choice Network of Western New York, Buffalo GYN Womenservices P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group. Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York which is dedicated to maintianing legal and safe access to family planning and abortion services in the Western New York area. The remainder of the appellees are health care providers from the Western New York area. For convenience, we will refer to the appellees as Pro-Choice Network.

her alleged acts of contempt did not create any genuine threat of irreparable injury. Behn and Rainero argue that the portion of the order they allegedly violated was not legally valid because the mere act of speaking to unwilling listeners does not create any legally actionable threat of irreparable injury. Futhermore, Behn and Rainero contend that their conduct was protected under the First Amendment and therefore was not a violation of the court's order. Finally, all appellants argue that, even if we uphold the district court's finding of civil contempt, we should vacate the amount and disposition of the sanctions.

Under our decisions in *New York State Nat'l Org. For Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) (*Terry I*), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990), and *New York State Nat'l Org. For Women v. Terry*, 961 F.2d 390 (2d Cir. 1992) (*Terry II*), *vacated sub nom. Pearson v. Planned Parenthood*, ___ U.S. ___, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993),[2] the sanctions the district court imposed on each of the appellants are clearly ones for civil, not criminal, contempt. Therefore, we are without jurisdiction to hear these appeals. Because we lack jurisdiction, we cannot consider the merits of any of appellants' other arguments including their alternative contention that we should vacate the amount and disposition of the sanctions.

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2 On February 22, 1993, the Supreme Court vacated our judgment in *Terry II* and remanded the case to us for further consideration in light of *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). *Bray* was decided after we heard oral argument in the appeals at bar and does not involve any of the issues of civil and criminal contempt we address in these appeals. Therefore, we rely on our reasoning in *Terry II* concerning the issue of contempt because we do not believe it is implicated by the Supreme Court's vacation of the *Terry II* judgment.



## BACKGROUND

Pro-Choice Network commenced an action in the district court on September 24, 1990 alleging that the defendants[3] had been engaging in a consistent pattern of illegal conduct at the appellees' health care facilities including blocking access to and egress from their facilities, trespassing, and harassing and intimidating their staffs and patients. The complaint stated causes of action under 42 U.S.C. § 1985(3) as well as under several state laws.

Immediately upon filing its complaint, Pro-Choice Network moved for a TRO to enjoin a blockade that defendants had announced for September 28, 1990. After conducting a hearing and hearing argument on the motion, the district court issued a TRO on September 27, 1990 enjoining appellants from conducting any blockade of the appellees abortion facilities and from harassing patients and staff entering or exiting these

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3 The defendants include three organizations, Project Rescue Eastern New York, Operation Rescue and Project Life of Rochester, and fifty individuals, including the three appellants before us. They are opposed to abortion and dedicated to the "pro-life" movement.

facilties.[4] Although the defendants held a demonstration on September 28, 1990, they complied with the terms of the TRO. After having previously extended the TRO several times, on November 2, 1990, with the consent of the appellants, the district court ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided. The court granted the preliminary injunction on February 14, 1992. *Pro-choice Network v. Project Rescue*, 799 F.Supp. 1417 (W.D.N.Y. 1992). Only two of the defendants appealed the prelminary

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[4] The TRO stated in pertinent part: ORDERED THAT Defendants ... are: 1. Temporarily enjoined and restrained in any manner or by any means from: (a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed; (b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed; Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.



injunction; none of the appellants now before us was part of that appeal.[5]

. . . . .

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of a health care facility where abortions are performed in the Western District of New York, nor shall any person make such sounds which interferes [sic] with the rights of anyone not in violation of this Order; (d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b) and (c) above.

Nancy Walker

On December 6 and December 14, 1990, Pro-Choice Network filed motions for contempt against Walker based on incidents on November 29, 1990 outside Dr. Paul Davis' office and on December 1 and December 8, 1990 outside the premises of the Buffalo GYN Womenservices. In the words of the district

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[5] By consent of the parties to that appeal, the appeal of the preliminary injunction was withdrawn without prejudice to its being renewed pending resolution of the related United States Supreme Court case of *Bray v. Alexandria Women's Health Clinic*. The Supreme Court's decision in *Bray* was issued on January 23, 1993. *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). The appeal of the preliminary injunction was reinstated on February 1, 1993. On March 24, 1993, the parties stipulated to the withdrawal of the appeal without prejudice to its being renewed within twenty days after the district court's decision of a pending motion to dismiss in the underlying civil action.

court, Pro-Choice Network sought "compensatory and coercive civil contempt sanctions to remedy the loss they suffered as a result of the alleged violations, and to coerce Walker into conforming her behavior to the terms of the TRO in the future." The court held evidentiary hearings on these charges over the course of several days between February 6 and February 14, 1991. On July 24, 1992, Judge Arcara issued a decision and order finding Walker in contempt based on the two incidents which occurred on November 29, 1990 and December 1, 1990. the following facts are taken from the district court's opinion.

On November 29, 1990, Walker was part of a demonstration outside a health care facility that performs abortions in Amherst, New York. She repeatedly attempted to "counsel" three people, one of whom had an appointment with a doctor at the facility. The district court found that "[c]onfronted with Walker's loud and invasive behavior, [the three] repeatedly asked Walker to leave them alone." Walker ignored the requests and, according to the district court, her conduct "impeded and hindered" the access of these three people to the clinic.

On December 1, 1990, Walker was located outside the Buffalo GYN Womenservices' clinic as part of a demonstration offering "sidewalk counseling" to women entering the clinic. She approached two women who were seeking access to the clinic. The district court found that she pursued these two women for an entire city block, harassing them all the while. The court stated, "[s]he yelled at them, crowded them, invaded their personal space, and impeded and hindered them from entering the clinic."

The district court found that the collateral bar rule precluded Walker from challenging the validity of the TRO as a defense against the imposition of contempt sanctions. After



discussing the standard for holding someone in civil contempt, the district court concluded that Walker was in civil contempt of the TRO on November 29 and on December 1, 1990. The court found that the TRO was clear and unambiguous and that the proof of noncompliance was clear and convincing. The court further found that Walker was not reasonably diligent and energetic in attempting to achieve compliance with the TRO and that her violation was willful.

The TRO provides that failure to comply with it will subject the contemnor to civil damages of $10,000 per day for the first violation and to a civil contempt fine double that of the previous fines for successive violations. [993][6] The district court ordered Walker to pay an "immediate" sanction of $10,000 to be divided evenly between Dr. Davis and Buffalo GYN Womenservices; the court stated that these plaintiffs had "made an uncontested showing of cognizable injuries to their operations resulting directly from Walker's unlawful conduct." Because Walker had established that she had limited financial resources, the court made payment of the remianing $20,000 contingent on future violations of the preliminary injunction. The court also

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[6] The TRO specifically provides, in pertinent part:
ORDERED that the failure to comply with this Order by any Project Rescue participant or participant in any of the activities enjoined in paragraphs (a) through (d) above with actual notice of the provisions of this Order shall subject him or her to civil damages of $10,000 per day for the first violation of this Order; and it is further ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fines.

granted Pro-Choice Network's request for reasonable attorney's fees and costs associated with enforcing the TRO.[7]

With respect to the incident that occurred on December 8, 1990, the district court found that Pro-Choice Network had failed to meet its burden of proving Walker's noncompliance by "clear and convincing evidence."

Behn and Rainero

On October 22, 1990, Pro-Choice Network petitioned for civil contempt against Behn and Rainero claiming that on October 20, 1990 Behn and Rainero violated the TRO. The district court held hearings on Pro-Choice Network's petition over the course of several days from June 18, 1991 to July 12, 1991. The court issued a decision and order on August 14, 1992 finding Behn and Rainero in contempt of court based on the events of October 20, 1990. The following facts are taken from the district court's opinion.

On that day, Behn and Rainero were in the vicinity of the Buffalo GYN Womenservices' clinic with, according to the district court, the intent "to dissuade women entering the clinic from obtaining abortions by offering them 'sidewalk counseling.'" Behn and Rainero approached two young men and a young woman who were apparently headed toward the clinic. They began talking to the woman and offering her literature and assistance. After three "pro-choice" escorts came to escort the

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[7] The TRO also provides for the payment of costs. It states: ORDERED that each contemnor shall be jointly and severally laible for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.



three to the clinic, Behn and Rainero continued to walk alongside the group. When the young woman began to get upset, the escorts told her there was a TRO in effect and that Behn and Rainero would have to stop talking to her if she asked them. The district court found that the young woman turned to Behn and Rainero and asked them to leave her alone. Despite Behn's and Rainero's testimony to the contrary, the district court also found that it was clear that the young woman was asking both Behn and Rainero to leave her alone. The woman later repeated her request to be left alone.

As it had found previously with Walker, the district court again found that the collateral bar rule precluded Behn and Rainero from challenging the validity of the TRO as a defense, that both Behn and Rainero were in civil contempt of the TRO on October 20, 1990, that the TRO was clear and unambiguous, that the proof of noncompliance was clear and convincing, that Behn and Rainero were not reasonably diligent and energetic in attempting to achieve compliance with the TRO and that their violation was willful.

In accordance with the provisions of the TRO, the district court ordered Behn and Rainero each to pay $10,000 in damages to Buffalo, GYN Womenservices which had "made an uncontested showing of both actual injury, in the form of disrupted daily operations and patients rendered upset and distressed, and compensable loss, consisting of the cost of extra security measures and additional staff." The court also ordered them to pay attorney's fees and costs.

All three appellants now appeal the district court's findings of contempt.

## DISCUSSION

[1] We address first our jurisdiction to hear these appeals. All parties to these appeals [994] agree that a party to a pending proceeding may not appeal from an order of civil contempt except as part of an appeal from a final judgment, whereas an adjudication of criminal contempt is a final order appealable prior to final judgment. *See, e.g., United States v. Johnson*, 801 F.2d 597, 599 (2d Cir. 1986). This general rule "prevents interlocutory appeals that fragment the disposition of 'what for practical purposes is a single controversy.'" *Id.* (quoting *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940)).

The demarcation between civil and criminal contempt is well established. *Terry I*, 886 F.2d at 1350. In *Terry I*, we explained:

> The two species of contempt are distinguished by determining the purpose for which a sanction was imposed . . . . A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil . . . . A sanction imposed to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief, is criminal in nature.

*Id.* at 1350-51 (citations omitted).

The district court found that, as to all three appellants, it was "abundantly clear . . . that the present contempt proceedings [were] civil, rather than criminal, in nature." If the district court was correct, we lack jurisdiction to hear these appeals. The district court's labeling of the contempt as "civil"



is a relevant consideration and "there is a 'presumption in favor of finding civil as opposed to criminal contempt where there is some doubt as to the nature of the contempt.'" *United States v. Ayer*, 866 F.2d 571, 573 (2d Cir. 1989) (quoting *United States v. Wendy*, 575 F.2d 1025, 1029 n. 13 (2d Cir. 1978)).

Appellants argue that because the district court's unconditional fines were neither coercive nor compensatory they are immediately appealable as orders of criminal contempt. Appellants contend that contempt sanctions cannot be justified as coercive if the contemnor is not given the opportunity to avoid the sanction after she is first found to have violated the court's order. They argue that the fines at issue here were imposed unconditionally with no chance for appellants to purge themselves of the contempt following their first violation of the district court's order, and that the contempt sanctions are therefore criminal, not civil, in nature. The district court rejected this argument as have we in previous decisions.

In *Terry I*, we upheld contempt sanctions against contemnors who violated a TRO limiting antiabortion protests, rejecting the argument that the district court's failure to provide the defendants with an opportunity to cure or purge themselves of the contempt was a punitive criminal sanction. 886 F.2d at 1350-52. The *Terry I* case was originally commenced in New York State Supreme Court. The state court issued a TRO and subsequently modified it to prohibit the blocking of access to facilities where abortions are performed. *New York Nat'l Org. For Women v. Terry*, 697 F.Supp. 1324, 1326-27 (S.D.N.Y. 1988). The *Terry I* defendants removed the case to federal court on May 3, 1988 after a demonstration was held that day during which several hundred antiabortion protestors were arrested for blocking access at a clinic where abortions are performed. *Id.* at 1328. The May 3, 1988 demonstration did

not lead to any contempt charges. On May 4, 1988, the district judge continued the TRO that the state court previously had entered but modified it. In addition to the previously existing prohibitions, the district judge added coercive sanctions of $25,000 for each day the defendants violated the terms of the order and included a provision that failure to give the city advance notification of the location of any demonstration would make the defendants liable for excess costs incurred by the city due to the lack of notice.

On May 31, 1988 the Terry I plaintiffs moved for civil contempt against the defendants for demonstrations that had occurred on May 5 and 6. The judge granted the motion and imposed $50,000 in civil contempt sanctions to be paid by two of the defendants to the plaintiff National Organization For Women (NOW) and $19,141 to be paid to the city. We held that the sanctions were civil but modified the district court's ruling by **[995]** directing that the sanctions be paid to the court rather than to NOW because NOW had provided no evidence that it had sustained injury as a result of the defendants' activities. *Terry I*, 886 F.2d at 1350-54.

Appellants attempt to distinguish our holding in *Terry I*. They point out that in *Terry I* the district judge modified the TRO to provide for prospective penalties only after he received uncontroverted evidence that the defendants conducted a demonstration on May 3, 1988 in violation of the state court's TRO. *See* 697 F.Supp. at 1330. Appellants argue, therefore, that in *Terry I* the contempt sanctions were civil because even after the defendants first violated the state court's injunction they were given the opportunity to avoid coercive penalties by refraining from any future violations. In support of this argument they rely on the following language in our opinion in *Terry I*:



> The purpose for which the subject sanctions were imposed suggests that they are civil. On May 3, 1988 Operation Rescue conducted a demonstration outside a Queens, New York clinic, ignoring the state court's second TRO, which had been personally served on defendant Terry. As a result, the district court modified the state court's order by including coercive sanctions of $25,000 for each subsequent daily violation of its order. At this point, there is no doubt that the sanctions were entirely conditional and coercive.

*Terry I*, 886 F.2d at 1351.

Although this quote taken alone arguably supports appellants' contentions, later language in the same paragraph clarifies the basis for our conclusion that the sanctions in that case were ones for civil contempt. We continued:

> [D]efendants were forewarned on May 4 and May 5, 1988 that future violations would result in monetary sanctions. The prospectively fixed penalties were plainly intended to coerce compliance with the court's order and to preserve the parties' then-existing legal rights . . . . Faced on May 5, 1988 with a choice between compliance or noncompliance with the district court's order, defendants chose the latter course. The factual determination of noncompliance--the assessment of whether the standards showing contempt were satisfied--and the resulting imposition of fines necessarily occurred after defendants' ample opportunity to comply had come and gone. Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature.

*Terry I*, 886 F.2d at 1351; *see also Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 532-33 (9th Cir. 1991) (relying on *Terry I* to find that sanctions imposed against individuals for their first violation of an injunction against antiabortion demonstrations were civil rather than criminal contempt sanctions).

Furthermore, any attempt by the appellants to distinguish *Terry I* is foreclosed by our subsequent decision in *Terry II*. In *Terry II*, we held, *inter alia*, that several nonparties who previously never had been held in contempt for violating the court's injunction were properly fined $25,000 for their first adjudicated violations. 961 F.2d at 394. In response to appellants' argument in that case that the contempt fines were criminal in nature, rather than civil, we stated: "[W]e ruled to the contrary in *Terry I*. . . . These issues are therefore settled in this circuit, absent reconsideration *in banc* or a different ruling by the Supreme Court." *Id*. at 395 (citation omitted). We are not persuaded by appellants' argument that this holding was based on the fact that persons acting in concert with the *Terry II* non-party appellants previously had been found in contempt of the court's order. There is no support for this proposition in our opinion in *Terry II*.

[2] We find it unnecessary to address the arguments concerning whether the contempt sanctions were also compensatory in nature. The sanctions were imposed on each of the appellants in this case to compel obedience to a lawful court order. Under our teaching in *Terry I* and *Terry II* these awards are clearly ones for civil, not criminal, contempt. Therefore, we are without jurisdiction to hear this appeal.

**[996]** Appellants contend that, even if we hold that these are orders of civil contempt, we should vacate the amount



and disposition of the sanctions. We disagree. Because we lack jurisdiction over these appeals we cannot consider the merits of this contention or of any of appellants' other arguments. Appellants could have challenged the merits of these contempt orders on an appeal from the preliminary injunction. However, their counsel indicated during oral argument that for financial reasons they chose not to do so.

Finally, we see no reason to follow appellants' alternative suggestion that we invoke the extraordinary power of mandamus and decline to do so.

## CONCLUSION

We dismiss both appeals for lack of appellate jurisdicition.

**APPENDIX D**

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.,**

**Plaintiffs,**

**v.**

**PROJECT RESCUE WESTERN NEW YORK, ET AL.,**

**Defendants.**

**No. CIV-90-1004A**

Unites States District Court
Western District of New York

DEFENDANTS' STIPULATIONS

In the interest of greatly expediting the anticipated hearing before this Court on plaintiffs' motion for a preliminary injunction, and to eliminate the need for a great deal of proof, defendants hereby propose the following two stipulations with respect to this Court's preliminary injunction.

I. *THE INJUNCTION AGAINST "BLOCKADES"*

Following the conclusion of this Court's hearing on the preliminary injunction application, defendants will consent to the entry of a preliminary injunction which would enjoin and restrain defendants from:



> Blocking or obstructing ingress into or egress from any facility at which abortions are performed in the Western District of New York, including trespass upon buildings where those abortions are performed, and trespassing on private property by individuals acting in concert with others who are at that time and place blocking or obstructing ingress into or egress from such facilities.

This stipulation is intended to track almost exactly the language of the first subparagraph of the injunction upheld in *New York State NOW v. Terry*, 886 F.2d 1339, 1345 n.1 (2d Cir. 1989). The only deviation from the exact language used in that case is intended to clarify that this stipulation would not reach the conduct of some individual who was doing nothing other then trespassing on private property outside of an abortion building at a time when no individual was engaged in blocking or obstructing access to that facility -- a unique situation which was not even considered by the federal courts in the *Terry* case, and which does not pose any danger of the sort of "irreparable injury" identified by the Court in that case.

This stipulation is with respect to a preliminary injunction only, and is not binding upon any of the defendants at the time this Court elects to decide whether to enter a permanent injunction in this case. The stipulation is grounded in part upon certain questions which have already been decided adversely to defendants by the Court of Appeals for this Circuit, but which the United States Supreme Court has recently agreed to review.

Defendants' willingness to enter into this stipulation is also grounded in part upon the fact that this Court has already denied their motion to dismiss the complaint under the abstention doctrine. This stipulation is without prejudice to the right of the

defendants, if they desire, to appeal from any preliminary injunction issued by this Court on the grounds that the entire complaint should have been dismissed for the reasons already set forth in defendants' motion to dismiss the complaint.

II. *IDENTITY OF THE DEFENDANTS*

Although defendants have denied the existence of a "conspiracy" as described in the complaint, they see no point in putting the parties and the Court through the expense and delay of attempting to prove, at this early stage of the case, exactly which defendants are or are not members of the so-called "conspiracy." For that reason, and to greatly streamline the length of this Court's hearing, defendants will stipulate as follows. If this Court concludes that some or all of the relief requested by plaintiffs should be granted on a preliminary injunctive basis, defendants will consent to the entry of such an injunction against each and every one of them. Assuming that plaintiffs can satisfy the prerequisites for the issuance of a preliminary injunction, including the possibility of irreparable injury, this stipulation will totally eliminate the need for plaintiffs to offer any proof as to which of the individual defendants are likely to engage in such conduct if not enjoined during the pendency of this action. (Of course, defendants do not concede that any of them are likely to engage in any specific acts or conduct in the absence of an injunction, but those defendants who have no intention of engaging in certain forms of activity will not object to the entry of a preliminary injunction against such activities.)

As with the first stipulation outlined above, this stipulation is for the purposes of a preliminary injunction only. It is intended only to streamline the scope of anticipated proof at this Court's preliminary injunction hearing, and will not waive the right of any individual defendant, as appropriate, to object to



the entry of any permanent injunction against them individually at the time of the final trial on the merits of this action, and after the completion of pretrial discovery in this case.

DATED: Buffalo, New York
March 5, 1991

/s/
James J. Duane, Esq.

Attorney for Defendants
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Buffalo, New York 14202
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## APPENDIX E

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, Buffalo GYN Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., P.C., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, Alexander Women's Group,**

**Plaintiffs,**

**v.**

**PROJECT RESCUE WESTERN NEW YORK, Operation Rescue, Project Life of Rochester, Rev. Paul Schenck, Rev. James L. Evans, Rev. Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Rev. Daniel Hamlin, James Handyside, Pamela Huffnagle, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Doe(s) and Jane Doe(s), the List Two Being Fictitious Names, the Real Names of Said Defendants Being Presently Unknown to Plaintiffs, Said Fictitious Names Being Intended to Designate Organizations or Persons Who Are Members of Defendant Organizations, and Other Acting in Concert With Any of the Defendants**



**Who Are Engaging in, or Intend to Engage in, the Conduct Complained of Herein,**

**Defendants.**

**No. 90-CV-1004A.**

United States District Court,
W.D. New York.

February 14, 1992.

**[1421]**[1] Isabelle Marcus, Lucinda Finley, Glenn Murray, Buffalo, N.Y., for plaintiffs.

James Duane, Virginia Beach, Va., for defendants.

DECISION AND ORDER

ARCARA, District Judge.

I. INTRODUCTION

Presently before the Court is plaintiffs' motion for a preliminary injunction, pursuant to Fed.R.Civ.P. 65(a), enjoining defendants from engaging in an allegedly illegal effort to prevent women from obtaining abortions and other gynecological and family planning services in a number of medical and family planning clinics located throughout the Western New York area. An evidentiary hearing was held over the course of several days from March 6, 1991 to April 1, 1991.

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[1] Bracketed numbers in bold type indicate page numbers from decision reported at 799 F.Supp. 1417 (W.D.N.Y. 1992).

The parties were then given an opportunity to brief and argue their respective positions. The Court has also considered evidence adduced at the contempt hearings of defendants Nancy Walker, Bonnie Behn, Carla Rainero, Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue Western New York ("Project Rescue"). Each of these defendants was charged with violating the Court's temporary restraining order ("TRO") in this case.

As part of their response to the motion for a preliminary injunction, defendants have moved the Court to reconsider its Decision and Order dated October 29, 1990, denying defendants' motion to dismiss the action pursuant to the abstention doctrine.

After considering the evidence adduced at the preliminary injunction and contempt hearings, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' motion for a preliminary injunction. The preliminary injunction is attached as an appendix to this Decision and shall also be filed under separate cover. Further, the Court has reconsidered its Decision and Order dated October 29, 1990, and denies defendants' motion to dismiss the action based on the abstention doctrine. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

## II. BACKGROUND

Plaintiffs, Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group and Alexander Women's Group, are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. Its primary goal



is to maintain legal and safe access to family planning and abortion services in the Western New York area. It also organizes some of its **[1422]** members to serve as escorts for patients seeking access to plaintiff health care providers' facilities.

Defendants include three organizations, Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and fifty individuals opposed to abortion and dedicated to the "pro-life" movement.[1] Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of patients and staff.

On September 24, 1990, plaintiffs commenced this action by filing a Complaint asserting seven causes of action. The first cause of action asserts claims under 42 U.S.C. § 1985(3), based on an alleged conspiracy to deny women seeking abortion or family planning services the equal protection of the laws and the equal privileges and immunities of national citizenship. More specifically, plaintiffs allege that defendants have conspired to infringe the constitutional rights of women seeking abortion and family planning services to travel and to choose to have an

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[1] The Complaint also names as defendants John and Jane Doe. These are obviously fictitious names and are intended to represent members of defendant organizations and others acting in concert with the named defendants.

abortion.[2] The Court has subject matter jurisdiction over this cause of action pursuant to 28 U.S.C. §§ 1331, 1343. The remaining six causes of action assert claims based on New York State law. They include: (1) violation of N.Y.Civ.Rights Law § 40-c, and N.Y.Exec.Law § 296; (2) tortious interference with business; (3) trespass; (4) intentional infliction of emotional harm; (5) tortious harassment; and (6) false imprisonment.[3] These causes of action fall under the Court's supplemental jurisdiction. Along with declaratory and injunctive relief, plaintiffs seek compensatory and punitive damages.

Immediately upon filing their Complaint on September 24,1990, plaintiffs moved for a TRO, pursuant to Rule 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the "blockade" was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard oral argument on the application for a TRO. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the Complaint and supporting affidavits, the Court, following *New*

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2 The court notes that a case involving similar issues is pending before the United States Supreme Court. *NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D.Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted, sub nom., Bray v. Alexandria Women's Health Center*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991). While the outcome in that case may require the Court to revisit this Decision, the Court has an obligation to move forward with the law as it currently stands in this Circuit.

3 Plaintiffs filed an Amendment Complaint on October 17, 1990 and a Second Amended Complaint on November 5, 1990. Neither of these complaints changed the substantive claims against defendants. They simply added certain plaintiffs to the action.



*York State NOW v. Terry*, 704 F.Supp. 1247 (S.D.N.Y.), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990), issued a TRO enjoining defendants from conducting any "blockade" of plaintiffs' medical facilities, and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a "blockade," on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1990 hearing, plaintiffs established service on nearly all defendants, and James Duane, Esq. appeared on defendants' behalf. Mr. Duane alerted the Court that it was defendants' intention to file a motion to either dismiss or stay the action pursuant to the abstention doctrine. The Court then put the parties on a briefing schedule and issued an order extending the TRO until the motion was decided.

**[1423]** Oral argument on defendants' motion to dismiss or stay the action was held on October 19, 1990. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided.

On October 22, 1990, during the pendency of defendants' motion to dismiss, plaintiffs filed motions for civil contempt against defendants Bonnie Behn and Carla Rainero alleging that they violated the Court's TRO on October 20, 1990. On December 6, 1990, plaintiffs filed a motion for civil contempt against defendant Nancy Walker alleging that she violated the TRO on November 29 and December 1, 1990. On December 14, 1990, plaintiffs filed another motion for civil

contempt against Walker alleging that she violated the TRO on December 8, 1990. On March 26, 1991, plaintiffs filed motions for civil contempt against defendants Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue alleging that they violated the TRO on December 29, 1990.[4]

During the months of December, 1990 and January, 1991, the parties, with the assistance of the Court, attempted unsuccessfully to settle this action. A hearing on the contempt motion against Nancy Walker was then held from February 6, 1991 to February 14, 1991. Then, as stated earlier, a preliminary injunction hearing was held from March 6, 1991 to April 1, 1991. Subsequently, a hearing on the contempt motions against Bonnie Behn and Carla Rainero was held from June 18, 1991 to July 12, 1991. Finally, a hearing on the contempt motions against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue was held from October 15, 1991 to January 30, 1992.

## III. FINDINGS OF FACT

It is indisputable that all defendants in this case share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. To achieve these goals, individual defendants have agreed and combined with one another and with the organizational defendants to coordinate, organize and participate in "rescue" demonstrations at abortion clinics located throughout Western New York, While these "rescue" demonstrations are usually peaceful in nature, they

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[4] On January 3, 1992, plaintiffs filed a motion for civil contempt against defendants Rev. Paul Schenck and Rev. Daren Drzymala. The Court has not yet held a hearing on this contempt motion.



often become emotionally charged encounters between demonstrators, patients and patient escorts.

During the hearings, several defendants insisted that Project Rescue is not an entity subject to being enjoined or held in contempt. The Court finds that, although not organized in corporate or partnership form, Project Rescue produces and distributes literature that encourages participants to gather in front of abortion clinics and block or impede access to them, has official spokespersons and designated leaders who organize and plan its activities, possesses a mailing address, engages in correspondence, has an active telephone "hotline", seeks donations in its name, and reimburses its members for expenses. Thus, Project Rescue possesses adequate characteristics of a legal entity to be enjoined or held in contempt.

There are three types of "rescue" demonstrations at issue in this case: (1) physically "blockading" health care facilities in order to prevent women seeking abortions and medical personnel from entering or exiting the facilities; (2) constructively "blockading" the clinics by demonstrating and picketing in a loud and disruptive manner outside the health care facilities, and by harassing patients and staff trying to enter such facilities; and (3) "sidewalk counseling" of patients entering the clinic. By disrupting and "blockading" family planning and abortion clinics, and conducting "sidewalk counseling," defendants and their followers hope to: (1) prevent abortions; (2) dissuade women from seeking **[1424]** abortion services; and (3) impress upon the public the moral righteousness of their "pro-life" views.

### A. *Blockading*

The first type of "rescue" demonstration involves physically "blockading" access to and egress from the plaintiffs' clinics. This type of "rescue" demonstration is usually well

organized and involves a large number of "pro-life" demonstrators. During these "blockades," the demonstrators trespass on the clinic property and sit or lay in the entrances of the clinic in an attempt to block access to and egress from the clinic. The demonstrators often lock arms or chain themselves together in order to make it more difficult for police to remove them. The plaintiff health care providers have been victims of these "blockades" on numerous occasions. On many of those occasions, the operation of the targeted facility was effectively stopped or significantly hampered. This physical "blockade" type of "rescue" demonstration was the type scheduled by defendants for September 28, 1990, and was the impetus behind the Court's TRO.[5]

B. *Constructive Blockade*

Besides physically "blockading" the clinics, defendants also constructively "blockade" them by demonstrating and picketing around the entrances of the clinics, and by harassing patients and staff entering and leaving the clinics. The constructive "blockade" has the same purpose as the physical "blockade," *i.e.*, to prevent or dissuade patients from entering the clinic. However, instead of physically blocking patient access to the clinics, defendants constructively "blockade" the clinics by forcing patients to run a gauntlet of harassment and intimidation in the hope that the patients will turn away before entering.

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5 Prior to the preliminary injunction hearing, defendants stipulated that the physical "blockade" type of "rescue" demonstration may be enjoined. Thus, the evidence adduced at the preliminary injunction hearing centered on the constructive "blockade" type of demonstration and "sidewalk counseling." Commendably, there have been no physical "blockades" since the Court issued the TRO.



On days when abortions are scheduled to be performed, defendants and others acting in concert with them under the auspices of the organizational defendants, picket and demonstrate in and around plaintiffs' health care facilities. Demonstrators frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities. The presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger to both the occupants of the cars and the demonstrators themselves. The demonstrators also make loud and disruptive noises and chant persistently. On some occasions, the drivers and occupants of the cars trying to enter the clinic parking lots are so intimidated or confused by the demonstrators that they leave the area thereby causing those occupants seeking heath care to suffer a delay in obtaining such care.

At times, demonstrators yell at patients, patient escorts and medical staff entering and leaving the health care facilities. The demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff. This activity causes stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care.

C. *"Sidewalk Counseling"*

Defendants also engage in an activity that they refer to as "sidewalk counseling." "Sidewalk counseling" consists of proffering literature to women entering the health care facilities and trying to convince them not to undergo an abortion. While [1425] defendants contend that this "sidewalk counseling" is

done in a peaceful, non-threatening manner and is only intended to provide women with the information necessary to make an informed decision about abortion, the evidence adduced at the hearings clearly demonstrates that, because of the highly emotional nature of the abortion issue, and the privacy concerns of the patients, even peaceful counseling, when conducted in the compressed space at the entrances of the medical facilities, often erupts into a charged encounter between "sidewalk counselors," patients and patient escorts.

During these encounters, "sidewalk counselors" often become angry and frustrated when patients and patient escorts persist in entering the clinics.[6] The "counselors" then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering. They continue to do so even after the patients signal their desire to be left alone. The "sidewalk counselors" often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level. At times, the voices of "sidewalk counselors" can be heard inside the health care facilities, thereby disturbing the quiet environment necessary for providing safe and efficacious health care. Some "counselors" have even used bullhorns to reach patients who have already entered the clinics.

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[6] The Court notes that the patient escorts also become frustrated and angry by the persistence of the "sidewalk counselors." The patient escorts often respond by raising their voices in order to drown out the "counselors'" message, and attempt to block and impede the "sidewalk counselors" from following the patients. While the Court can understand the frustration of the escorts, the evidence adduced at the hearings clearly shows that their behavior often serves only to exacerbate an already difficult situation.



The "sidewalk counselors" are comprised of a small group of dedicated "pro-life" activists who station themselves in front of plaintiffs' medical facilities on a regular basis. Many of the "sidewalk counselors" and other defendants have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff. Defendant Project Rescue offers training in the technique of "sidewalk counseling" and organizes the activities of "sidewalk counselors" by designating times and locations for "counseling," designating site captains for such "counseling," and directing "counselors" to keep a log of their activities and send information about their "counseling" to a designated member of the organization. Project Rescue has also reimbursed "sidewalk counselors" for their expenses.

Besides abortions, plaintiff health care facilities provide women with a variety of other medical and family planning services. Because information about patients is kept strictly confidential, the "sidewalk counselors" do not know which patients entering the facilities are there for an abortion and which are there to obtain some other medical or family planning service. The "sidewalk counselors" target younger-looking women because they are the ones most likely to be seeking an abortion. They also target cars that arrive at the facilities with out-of-state license plates because many of the patients coming to area clinics are from nearby states, especially Pennsylvania and Ohio, and from Canada. There is no way, however, for the "sidewalk counselors" to know for sure whether a woman entering the clinic is even seeking an abortion.

During "rescue" activities, defendants regularly use video cameras. Defendants insist that the purpose of the cameras is to record the actions of the "sidewalk counselors" so that the videotapes can be used to defend the "counselors" against unfounded harassment charges. However, the evidence adduced

at the hearings clearly indicates that, instead of using cameras for defensive purposes, defendants employ them as offensive weapons to intimidate patients seeking abortions.[7]

The videotapes offered by defendants during the contempt hearings show that **[1426]** the operators of the video cameras selectively record only those events that are favorable to defendants. During crucial moments when contemptuous conduct is alleged to have occurred, the camera was either turned off or pointed at the ground. Moreover, while defendants' stated purpose in using the video cameras is to record the activities of the "sidewalk counselors," the videotapes presented at the hearings show that the camerapersons almost always focus on the patient and the patient escorts. The "sidewalk counselors" are often not even on the screen. Thus, defendants' assertion that the cameras are used soelly for defensive purposes is just not credible.[8]

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[7] The Court heard testimony from two of the individuals who normally operate the video cameras, Michael Prestia and Richard Krolewicz. They stated that the only reason for the cameras being present is to protect the "sidewalk counselors" from unfounded harassment charges. The Court, however, finds that the testimony of these two individuals was biased, suspect and incredible. Their testimony was wrought with inconsistency, and their answers on cross-examination were often non responsive and evasive.

[8] During the hearing on the contempt motion against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue, plaintiffs made allegations that the videotapes offered into evidence by defendants were edited after the fact in order to eliminate footage damaging to defendants. Accordingly, as part of that hearing, the Court heard testimony from two expert witnesses as to the authenticity of the videotapes. The Court has not yet made a final determination whether the tapes were edited.



Instead, the evidence clearly shows that defendants use cameras as offensive weapons to harass and intimidate patients entering the clinics. Defendants have even pointed the cameras directly into the faces of patients seeking access to the clinics. They have also videotaped patient vehicles and their license plates as they enter the medical facilities. Defendants are well aware that women seeking abortions, especially younger women, are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion, and that the presence of cameras increases patients' fear that their identities might be revealed.

Thus, in view of all the evidence, it is reasonable to infer that defendants use cameras not as a defensive measure against unfounded harassment charges, but as offensive weapons to intimidate and embarrass patients into foregoing their scheduled appointments.

### D. *Response of Local Law Enforcement*

Local law enforcement has been unable to respond effectively to plaintiffs' complaints about "pro-life" demonstrators harassing patients and blocking access to the clinics. Defendants participate in their "rescue" activities on a continual basis and the local police do not have the resources necessary to monitor the situation constantly. Often times when they respond to a complaint, the demonstrators simply disperse, only to return later when the police depart. Even when police arrest a "pro-life" demonstrator for harassing a patient, successful prosecution is often difficult because the patient is reluctant to testify or cooperate out of fear that her identity might be made public. Furthermore, the record shows that arrest and conviction pursuant to local laws has not deterred defendants from repeatedly engaging in their illegal pattern of activity.

The large scale "blockades" pose a particular problem for police. The time and location of "blockades" are kept secret from the police so that they will be delayed in responding. Local law enforcement's response to large scale "blockades" requires a substantial commitment of police resources. Testimony adduced at the hearings also indicates that defendants have attempted to strike "deals" with the police as to the conditions under which they will cease their illegal activity, *i.e.*, defendants agree to cease "blockading" only if the clinic is closed down for the rest of the day.

In addition, defendants have attempted to hinder and interfere with local law enforcement by harassing those who invoke legal process against them. Local deputy police chief Samuel Camilleri testified that he and his fellow officers have been the object of harassment--both verbally and by mail--by the demonstrators. Chief Camilleri **[1427]** indicated that this harassment made it more difficult for him to do his job. Similar harassment has been directed against people who have testified against the demonstrators in local criminal court proceedings.

### E. *The Health Risks to Women Caused by Defendants' Activities*

Women who have been the target of "sidewalk counseling" or other "rescue" demonstrations usually enter the medical facilities visibly shaken and severely distressed. Several of the plaintiff health care providers testified that, for most women, the decision to undergo an abortion is already difficult and stressful. Plaintiffs presented uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health



care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Often times, patients are too upset to undergo the medical procedures scheduled for that day and must reschedule the procedure, though there is no guarantee that they will not encounter the demonstrators again upon returning. This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded, or if she becomes so distressed by the "sidewalk counselors" that she cannot undergo surgery, the above-mentioned complications may result.

For some women, the option to reschedule their appointment is not readily available. As stated earlier, many of the women seeking abortions in this area come from out-of-state and cannot readily reschedule their appointments if they are prevented or deterred by defendants' conduct from obtaining the abortion on the scheduled day.

The presence of video cameras is especially distressing to patients seeking abortions. The use of video cameras by defendants often makes patients hysterical or severely upset,

thereby causing a delay in their readiness for prompt medical attention. Furthermore, defendants' use of the video cameras prolongs the patients' stress and anxiety as they worry that their identity may be obtained by defendants and revealed to others, such as family members.

## IV. CONCLUSIONS OF LAW

### A. *Standing*

In *Terry*, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patients' "enjoyment of those rights is inextricably bound up with the activity the litigant wishes to pursue," and thus, the court could be "assured that the clinics represented the rights and interests of the women seeking their assistance." *Terry*, 886 F.2d at 1348 (citations omitted). The Court also held that "pro-choice" organizations have standing as representatives of their membership. *Id.* at 1349.

**[1428]** B. *Preliminary Injunction*

It is well established in the Second Circuit that a preliminary injunction may be granted only where the movant establishes (1) irreparable harm (if the injunction is not granted), and (2) either (a) the likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 972 (2d Cir. 1989); *Johnson v. Kay*, 860 F.2d 529, 540 (2d Cir. 1988); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).



1. *Irreparable Harm*

"[A] finding of irreparable harm is an absolute prerequisite to the issuance of an injunction...." *Fireman's Fund Ins. Co. v. Leslie & Elliot Co.*, 867 F.2d 150, 151 (2d Cir. 1989).

> To establish irreparable harm, plaintiffs must demonstrate an injury that is neither remote nor speculative, but actual and imminent. The injury must be one requiring a remedy of more than mere money damages. A monetary loss will not suffice unless the movant provides evidence of damage that cannot be rectified by financial compensation.

*Tucker Anthony Realty Corp.*, 888 F.2d at 975 (citations omitted).

[1] A deprivation of constitutional rights that cannot be repaired by an award of damages constitutes irreparable injury. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1026 (2d Cir. 1985); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). In this case, plaintiffs claim that defendants' "rescue" activities violate the constitutional rights of women to travel and to choose to have an abortion.

[2] Furthermore, as stated in the Court's Findings of Fact, plaintiffs have presented compelling, uncontradicted evidence that defendants' "rescue" activities cause patients stress and anxiety, thereby substantially increasing the risks associated with the medical procedures performed at the clinics. In addition, patients are often: (1) blocked from entering the clinics; (2) intimidated and harassed by defendants thereby

causing them to skip their scheduled appointments; or (3) too upset to undergo the medical treatment scheduled for that day. The resulting delay increases the risks associated with the abortion procedure and may lead to unnecessary complications.

In assessing irreparable injury and the need for injunctive relief, the Court is mindful of the fact the defendants intentionally target young women who are already undergoing the stressful situation of terminating an unwanted pregnancy. Thus, the Court must balance the need to protect these young vulnerable women from defendants' harassment against defendants' First Amendment rights.

The evidence also shows that defendants' activities have an adverse effect on the clinic medical staffs. Witnesses testified to increased stress among staff members that is directly attributable to defendants' "rescue" activities. This increase in stress causes the staff to be distracted and makes it difficult for them to maintain the calm environment necessary for treating patients.

In sum, the Court finds that those women denied unimpeded access to plaintiffs' health care facilities cannot be compensated money damages. Injunctive relief alone can assure women unimpeded access to plaintiffs' clinics. The irreparable harm flowing form defendants' "rescue" activities, including the medical risks and the denial of constitutionally guaranteed rights, is real and threatens to continue. Without some form of injunctive relief, prospective patients will suffer irreparable harm from delayed access to the clinics. *Terry*, 886 F.2d at 1362.

[1429] 2. *Likelihood of Success on the Merits or Sufficiently Serious Questions Going to the Merits to Make Them a Fair Ground for Litigation and a Balance of Hardships Tipping Decidedly in Plaintiffs' Favor*



a. *The 42 U.S.C. § 1985(3) Claims*[9]

To prevail on a § 1985(3) claim, a plaintiff must prove that: (1) defendants engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) acted in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *Terry*, 886 F.2d at 1358 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)). It is well established that § 1985(3) provides a cause of action for private conspiracies. *Id.* (citations omitted). Where the alleged conspiracy is aimed at the deprivation of a constitutional right guaranteed against government interference, for example rights secured by the First and Fourteenth Amendments, plaintiffs must demonstrate "state involvement." *Id.* (citation omitted)

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[9] Defendants argue that injunctive relief is not available under § 1985(3). However, several federal courts, including the Second Circuit, have held that injunctive relief is available under § 1985(3). *See, e.g., Planned Parenthood v. Holy Angels Catholic Church*, 765 F.Supp. 617 (N.D. Cal. 1991); *Women's Health Care Services v. Operation Rescue-National*, 773 F.Supp. 258 (D. Kan. 1991); *NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted, sub nom. Bray v. Alexandria Women's Health Center*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991); *Terry*, 704 F.Supp. at 1247; 886 F.2d at 1339; *Cousins v. Terry*, 721 F.Supp. 426 (N.D.N.Y. 1989); *Southwestern Medical Clinics of Nevada v. Operation Rescue*, 744 F.Supp. 230 (D. Nev. 1989).

[3] A conspiracy is with the scope of § 1985(3) only if it is motivated by some class-based, invidiously discriminatory animus. *Griffin*, 403 U.S. at 102, 91 S.Ct. at 1798. "Animus" means a motive or intent to interfere with the exercise of a right; not hostility, ill-will or personal animosity. *Id.* at 102 n.10, 91 S.Ct. at 1798 n.10; *Terry*, 886 F.2d at 1359-60. While the Supreme Court has thus far declined to rule on whether § 1985(3) reaches conspiracies directed against a class identified by characteristics other than race, *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836, 103 S.Ct. 3352, 3360, 77 L.Ed.2d 1049 (1983) ("close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans."); *Griffin*, 403 U.S. at 102 n.9, 91 S.Ct. at 1798 n.9, the Second Circuit in *Terry* expressly held that women seeking abortions constitute a protected class for purposes of § 1985(3). *Terry*, 886 F.2d at 1359.[10]

[4] In this case, plaintiffs have proven, by a preponderance of the evidence, that defendants engaged in a conspiracy to prevent women from obtaining access to plaintiffs' health care facilities. Project Rescue literature encourages participants to gather in front of clinics and block or impede access to them. Defendants agreed between themselves and with others to engage in unlawful activity such as trespassing and harassment. The conspiracy has an official spokesperson and designated leaders. Project Rescue reimburses members for

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10 The issue of whether women seeking abortions can constitute a protected class under § 1985(3) is currently pending before the Supreme Court. See *NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted, sub nom., Bray v. Alexandria Women's Health Center*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991).



costs incurred in furtherance of the conspiracy. This concerted effort clearly demonstrates the presence of a conspiracy to engage in an unlawful activity.

It is clear under *Terry* that defendants have the requisite class-based animus. There is uncontroverted evidence that defendants are opposed to the constitutional right of a woman to choose to have an abortion and that the object of their "rescue" activities is to hinder or prevent--**[1430]** a group that is a protected class under § 1985(3)--from exercising that right.

In sum, it is apparent that defendants are acting within the scope of § 1985(3) by: (1) engaging in a conspiracy; (2) against a cognizable class of persons, with invidious class-based animus; and (3) committing overt acts in furtherance of the conspiracy. The only remaining question is whether the conspiracy deprived the plaintiffs, and the women on whose behalf this claim is asserted, of any constitutional right. Plaintiffs claim that defendants' conspiracy infringes two constitutional rights of women seeking abortions: (1) the right to interstate travel; and (2) the right to choose to have an abortion.

(1) *Right to Travel*

[5][6] "[T]he right to interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference." *Griffin*, 403 U.S. at 105, 91 S.Ct. at 1800 (citations omitted). Deprivations of the right to travel are actionable under § 1985(3) with no need to show any state action or involvement. *Terry*, 886 F.2d at 1360 (citations omitted). The right to travel includes the right to unimpeded interstate travel to obtain an abortion and other medical services.

*Doe v. Bolton*, 410 U.S. 179, 200, 93 S.Ct. 739, 751, 35 L.Ed.2d 201 (1973); *Terry*, 704 F.Supp. at 1259; 886 F.2d at 1360.

[7] In this case, plaintiffs have presented uncontroverted evidence that defendants' "rescue" activities have infringed the right of women to travel interstate to obtain an abortion. Plaintiffs' heath care facilities render services to patients from other states, especially Pennsylvania and Ohio, and Canada. As stated earlier, defendants specifically target these out-of-state patients because they are easily identifiable. When out-of-state patients arrive at the clinics, they encounter "pro-life" demonstrators obstructing the clinic driveways thereby impeding them from entering the clinic parking lots. These obstructions require patients to take circuitous routes in order to enter the clinics unmolested. Out-of-sate patients have been forced to cancel their scheduled appointments on days when there were "rescue" demonstrations. The burden of having to reschedule an appointment is obviously greater for a patient having to travel from another state or Canada than it is for a local patient. In sum, it is clear that infringing the right of women to travel interstate to obtain an abortion is one of the objectives of defendants' conspiracy.

[8] Defendants argue that the right to travel is not implicated here because the primary objective of their "rescue" activities is to prevent women from having abortions, not to infringe the right of women to travel. However, interfering with the right to travel does not have to be the primary objective of defendants' conspiracy in order for § 1985(3) to apply. In *Griffin*, the defendants stopped and assaulted the plaintiffs who were driving on an interstate highway. The defendants had presumed that the plaintiffs, who were black, were involved in the civil rights movement, and wanted to stop the plaintiffs from further organizing civil rights activities. The Supreme Court



held that, while the primary objective of the conspiracy was to interfere with the right of the plaintiffs to engage in organizing civil rights activities, the fact that the interference occurred while the plaintiffs were traveling on an interstate highway was sufficient to implicate the right to travel. *Id.* 403 U.S. at 106, 91 S.Ct. at 1800. Thus, in this case, because plaintiffs have demonstrated that one of the objectives of defendants' conspiracy is to infringe the right of women to travel, § 1985(3) applies.

In sum, the Court finds that the plaintiffs have established a likelihood of success on the merits on their § 1985(3) claim based on the right to travel.

(2) *Right to Choose to Have an Abortion*

[9] The Supreme Court has held that a woman has a constitutional right under the Fourteenth Amendment to choose to have an abortion during the first trimester of her pregnancy without governmental interference. *Roe v. Wade*, 410 U.S. 113, 163, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973). **[1431]** Because the right to have an abortion derives from the Fourteenth Amendment, which prohibits only governmental interference, a conspiracy targeted at that right must implicate "state involvement" before it is actionable under § 1985(3). *Scott*, 463 U.S. at 833, 103 S.Ct. at 3358.

[10] The "state involvement" requirement is not the same as a "state action" test. As the Supreme Court has explained, it is merely "necessary ... to prove that the State was somehow involved in or affected by the conspiracy." *Scott*, 463 U.S. at 833, 103 S.Ct. at 3358; *Terry*, 704 F.Supp. at 1260.

> [If] private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause the authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(3).

*Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384, 99 S.Ct. 2345, 2355, 60 L.Ed.2d 957 (1979) (Stevens, J., concurring); *accord Scott*, 463 U.S. at 840 n.2, 103 S.Ct. at 3362 n.2.

[11] In this case, there has been substantial uncontradicted evidence that defendants' activities are intended, and do in fact, prevent and hinder local police from protecting the right of women to choose to have an abortion. By "blockading" access to abortion clinics in large numbers, refusing to notify police of their next target, attempting to strike "deals" with the police, and harassing the police officers and witnesses who testify against them in local criminal courts, defendants have acted to render local law enforcement officials incapable of keeping the clinics readily accessible to women who choose to have an abortion. Such action by private persons satisfies § 1985(3)'s "state involvement" requirement. *See Women's Health Care Services*, 773 F.Supp. at 265-66; *Terry*, 704 F.Supp. at 1260; *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F.Supp. 165, 168 (D. Oregon), *aff'd as modified*, 859 F.2d 681 (9th Cir. 1988); *but see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *Lucero v. Operation Rescue of Birmingham*, 772 F.Supp. 1193 (N.D. Ala. 1991); *Upper Hudson Planned-Parenthood, Inc. v. Doe*, 1991 WL 183863 (N.D.N.Y. Sept. 16, 1991).



[12] Furthermore, it cannot be disputed that defendants' activities have the object of depriving women of their right to choose to have an abortion. In addition, the same facts that satisfy the overt act requirement in connection with plaintiffs' claim based on their right to travel, likewise meet the overt act requirement for this claim. Finally, defendants' actions threaten injury to the protected class of women seeking abortions.

In sum, the Court finds that the plaintiffs have demonstrated a likelihood of success on the merits of their § 1985(3) claim based on the right of women to choose to have an abortion.

b. *State Law Claims*

(1) *New York Civil Rights Law*

[13] Having demonstrated a likelihood of success on the merits of their federal § 1985(3) claim, plaintiffs have also, by definition, demonstrated a likelihood of success on their claim under N.Y. Civ. Rights Law § 40-c. This section, which affords a private right of action against private individuals, provides that "no person shall, because of ... sex ... be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.05 of the penal law, in exercise thereof, by any persons ...." Since defendants' conspiracy is intended to deprive women of their constitutional rights to travel and to choose to have an abortion, and subjects them to harassment when they seek to exercise those rights, the conspiracy clearly violates N.Y. Civ. Rights Law § 40-c. Thus, plaintiffs have demonstrated a likelihood of success on the merits of this claim.

(2) *Trespass*

[14][15] Under New York law, trespass is the interference with a person's right to possession of real property either by an **[1432]** unlawful act or by a lawful act performed in an unlawful manner. *Ivancic v. Olmstead*, 66 N.Y.2d 349, 352, 497 N.Y.S.2d 326, 488 N.E.2d 72 (1985), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 658 (1986). To be liable, the trespasser need not anticipate the damaging consequences of his acts, but need only intend the act that amounts to an unlawful intrusion upon and interference with the property rights of another. *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331, 121 N.E.2d 249 (1954). The threat of continuing trespass entitled a property owner to injunctive relief where irreparable injury may result. *Terry*, 886 F.2d at 1361 (citing *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N.Y. 260, 268, 157 N.E. 130 (1927)).

[16] In this case, there is overwhelming evidence that defendants have repeatedly trespassed upon plaintiffs' property in the past and may continue to trespass in the future. A "blockade" is an intentional, unlawful act that clearly interferes with plaintiffs' right to possession of the facilities. Accordingly, plaintiffs have demonstrated a likelihood of success on the merits of their state trespass claim.[11]

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[11] In light of the Court's decision with regard to plaintiffs' § 1985(3) claim, N.Y. Civ. Rights Law § 40-c claim and state trespass claim, the Court need not address whether a preliminary injunction should be granted based on plaintiffs' other state law claim.



C. *Restriction on Defendants' First Amendment Rights*

[17] There is no question that defendants' activities constitute a form of political speech protected by the First Amendment. Defendants are entitled to express their views on abortion, "particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted." *Terry*, 886 F.2d at 1363 (citing *United States v. Grace*, 461 U.S. 171, 177-80, 103 S.Ct. 1702, 1706-09, 75 L.Ed.2d 736 (1983)). Yet, the First Amendment does not provide defendants with the "right to express their views to any person, at any time, in any manner, and in any place they may choose." *Id.* (citing *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)). Reasonable time, place and manner restrictions may be placed on defendants' activities as long as such restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988) (citations omitted); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable .... The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972) (citations omitted).

After applying these principles to this case, the Court finds that the preliminary injunction is: (1) content neutral; (2)

narrowly tailored to serve a number of significant government interests; and (3) leaves open ample alternative channels for communication of defendants' message. Thus, the injunction is a reasonable time, place and manner restriction and is not violative of defendants' First Amendment rights.

1. *Content Neutral*

[18] Content-neutral regulations of expression are "those that 'are justified without reference to the content of the regulated speech.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)). "The primary concern of content-neutrality is that no speech or expression of a 'particular content' is 'singled out' by the government for better or worse treatment." *Terry*, 886 F.2d at 1363 (citations omitted).

**[1433]** [19] In this case, the preliminary injunction is content-neutral. It regulates when, where and how defendants may speak, but not what they may say. The injunction makes no mention whatsoever of abortion or any other substantive issue; it merely restricts the volume, location, timing and harassing and intimidating nature of defendants' expressive speech. In fact, the injunction would apply equally to protests that support abortion, or indeed, to protests supporting or opposing any other cause. It is true that the injunction applies only to the defendants, but that is because it is only the defendants who have created a threat of harassment and intimidation. Thus, the injunction meets the content-neutral requirement.

2. *Narrowly Tailored to Serve a Significant Government Interest*



[20] There is no doubt that the preliminary injunction is necessary to serve several significant governmental interests. As stated earlier, the evidence adduced at trial clearly establishes that defendants' "rescue" activities significantly increase the health risks associated with the medical procedures performed at the plaintiffs' clinics. "The government 'may properly assert important interests in safeguarding health' and 'in maintaining medical standards' as regards the performing of abortions." *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 63 (3d. Cir. 1991) (quoting *Roe v. Wade*, 410 U.S. at 154, 93 S.Ct. at 727). Further, the government "has a legitimate interest in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. at 150, 93 S.Ct. at 725. Thus, the Court finds that the injunction serves the significant governmental interest of ensuring that abortions are performed safely. *See Northeast Women's Center*, Inc., 939 F.2d at 63; *Portland Feminist Women's Health Center*, 859 F.2d at 686.

In addition, the injunction effectuates the significant governmental interest of public safety. *Terry*, 886 F.2d at 1364. The injunction prohibits defendants from blocking traffic entering and leaving the clinics. It also prohibits defendants from abusing, grabbing, touching, pushing, shoving or crowding persons entering or leaving the clinics.

Finally, the injunction serves the significant governmental interest of ensuring "the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another." *Terry*, 886 F.2d at 1364. While defendants have a First Amendment right to express their opposition to abortion, women entering the clinic have the constitutional rights to travel unimpeded and to choose to have an abortion. Thus,

the Court has attempted to fashion an injunction that will ensure that the constitutional rights of both parties are protected to the fullest extent possible.

[21] Having established that there are significant governmental interests at stake, the Court must next determine whether the injunction is "narrowly tailored" to meet these interests. Defendants have stipulated to the entry of an injunction against "blocking or obstructing" access to plaintiffs' health care facilities and trespassing on such premises for the purpose of "blocking or obstructing" access. While the Court's preliminary injunction encompasses the conduct covered by defendants' stipulation, it is more comprehensive in order to cover the full range of defendants' activities. The Court's preliminary injunction is better tailored to the evidence and addresses not only physical "blockades," but other "rescue" activities as well.

In crafting the injunction, the Court has been guided by the paramount need to maintain an atmosphere conducive to the health care functions of plaintiffs' facilities. As the Supreme Court has advised, in evaluating the need for and legitimacy of restrictions on expressive activity, courts must keep in mind the normal functions of the location in question and whether the nature of the demonstration activity is conducive **[1434]** to or disruptive of normal activities. *Grayned*, 408 U.S. at 116, 92 S.Ct. at 2303. Here, in the context of health care facilities treating women who are already undergoing the stress normally associated with having an abortion, there is an attendant need for a calm, quiet, stress-free atmosphere. Defendants' noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting. The significant governmental interest inherent in providing safe medical care to the public justifies certain carefully drawn restrictions on defendants' expressive activities. *See Beth Israel Hosp. v.*



*NLRB*, 437 U.S. 483, 507-08, 98 S.Ct. 2463, 2477, 57 L.Ed.2d 370 (1978); *Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist.*, 670 F.2d 629, 632 (5th Cir. 1982).

[22] Paragraph (a) of the injunction is aimed at preventing defendants from obstructing and impeding access to plaintiffs' health care facilities. Paragraph (a) covers the full range of defendants' obstructive behavior including: obstructing and impeding access to and egress from the clinics, congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving or interfering with patients and staff as they approach the clinic on foot. As the Second Circuit noted in *Terry*, there is simply no First Amendment right to impede or obstruct access to public or private buildings. *Terry*, 886 F.2d at 1364 (citations omitted). Likewise, there is no First Amendment right to picket in a private driveway or parking lot.

[23] Paragraph (a) also enjoins trespassing on all areas of plaintiffs' health care facilities including parking lots and other surrounding property. This provision is necessary because of the uncontroverted evidence that defendants continuously trespass on the clinics' private property while they are demonstrating, picketing and "sidewalk counseling," as well as when they engage in physical "blockades." There is simply no First Amendment right to trespass upon private property, even when access to that property may be the only, or most effective, way to reach the intended audience. *See Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (finding no constitutional right to engage in labor picketing in a shopping center, even though picketing in that location was the only effective way for the labor union to reach its intended audience).

Paragraph (b) of the preliminary injunction secures unfettered access to the clinics by setting dual "clear zones" of fifteen feet around entrances and fifteen feet around people and vehicles seeking access. The "clear zones" are necessary to ensure that people and vehicles seeking access to the clinics will not be impeded, and will be able to determine readily where the entrances are located. Further, the "clear zones" will prevent defendants from crowding patients and invading their personal space. The Supreme Court has upheld "clear zones" in other demonstration contexts. *See, e.g., Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (upholding a Washington D.C. ordinance prohibiting picketing within 500 feet of a foreign embassy); *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) (upholding ban on picketing within 100 feet of a courthouse); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) (upholding ban on picketing within 100 feet of a jail).

The injunction's "clear zones" are not absolute. In an attempt to accommodate fully defendants' First Amendment rights, the Court, in paragraph (c) of the injunction, has made an exception to the "clear zones" for "sidewalk counselors." Paragraph (c) provides that a maximum of two "sidewalk counselors" may enter the fifteen foot "clear zones" around entrances and people approaching the clinics, for the purpose of counseling in a non-threatening manner. However, paragraph (c) also provides that once the targeted person or group of persons indicates, either verbally or non-verbally, that they do not wish to be counseled, the "sidewalk counselors" must "cease to desist" from counseling and move out of the fifteen foot "clear [1435]



zones."[12] This "cease and desist" provision is necessary in order to protect the right of people approaching and entering the facilities to be left alone.

[24] Defendants strenuously object to the "cease and desist" provision of the injunction. They argue that, because their "sidewalk counseling" occurs on a public sidewalk, they cannot be forced to cease communicating their message just because their audience may be unwilling to hear it. The Court, however, rejects this argument.

[25][26] There is no First Amendment right to communicate one's views to anyone, at any time, in any manner, or in any place that may be desired. *See Heffron*, 452 U.S. at 647, 101 S.Ct. at 2563. When speakers' interests conflict with those of unwilling listeners, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736 (1970). "[N]o one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 738, 90 S.Ct. at 1491.

[27] When a case presents a conflict, as this one does, between the right to speak and the right to be left alone, the Supreme Court has held that the right of the unwilling listener to

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12 A similar "cease and desist" provision is included in the Court's TRO. There was testimony adduced at the hearings that defendants have attempted to circumvent this provision by using a "relay" system, *i.e.*, once the targeted person rejects the counseling of a particular "sidewalk counselor," another one steps forward and continues counseling. This "relay" system obviously violates the spirit, if not the letter, of the Court's TRO. Once the targeted person or group of persons rejects counseling, that rejection is applicable to all "sidewalk counselors."

be left alone is paramount when that listener is a "captive audience." *See, e.g. Frisby*, 487 U.S. at 474, 108 S.Ct. at 2495; *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542, 100 S.Ct. 2326, 2335, 65 L.Ed.2d 319 (1980); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). The "captive audience" doctrine, simply stated, is that a listener has a right not to be exposed to an unwanted message in circumstances in which the communication cannot be avoided. *Frisby*, 487 U.S. at 488, 108 S.Ct. at 2504 (upholding local ordinance banning "focused" picketing of a single residence); *Lehman*, 418 U.S. at 298, 94 S.Ct. at 2714 (upholding ban on political messages on public buses because the need of riders on public transportation to get where they wanted to go made it practically impossible for them to avoid unwanted political messages); *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484 (upholding statute that allowed householder to require Postmaster General to order senders of "junk" mail to remove addressee's name from sender's mailing list); *Kovacs*, 336 U.S. at 77, 69 S.Ct. at 448 (upholding ban on amplified sound trucks because they are so intrusive that they made it impossible for people to escape their message).

[28] The "captive audience" doctrine is an essential component of First Amendment freedoms since the same interest in personal autonomy underlies both the right to speak and the right to be left alone. "The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe as one wishes, are important aspects of the constitutional right to be let alone." *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 468, 72 S.Ct. 813, 823, 96 L.Ed. 1068 (1952) (Douglas, J., dissenting) (Justice Douglas' dissenting position in *Pollak*, that a state



authority had no right to broadcast radio messages onto public transit, became the holding of the majority of the Court in *Lehman*). The "captive audience" doctrine stems from the fact that it is possible "to jeopardize autonomy of thought by communication to parties who do not wish to receive a message. The personal right of a listener to refuse to hear a given message is jeopardized by the speaker who blocks the listener's path to communicate his message ...." *Taylor*, I'll Defend to the Death Your Right to Say It ... But Not to Me--The Captive Audience Corollary **[1436]** to the First Amendment, 1983 S. Ill. Univ. L.J. 211, 215-16 (1983).

[29] In general, the "captive audience" doctrine does not apply when the unwilling listeners or viewers are located on the public street or sidewalk because they can avoid the unwanted message simply by walking away or averting their eyes. *Erznoznik v. Jacksonville*, 422 U.S. 205, 211, 95 S.Ct. 2268, 2273, 45 L.Ed.2d 125 (1975); *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). However, whenever someone cannot, as a practical matter, escape from the unwanted intrusion, the speaker's expressive activity can be restricted under the "captive audience" doctrine. *Frisby*, 487 U.S. at 487, 108 S.Ct. at 2504; *Lehman*, 418 U.S. at 298, 94 S.Ct. at 2714; *Rowan*, 397 U.S. at 728, 90 S.Ct. at 1484; *Kovacs*, 336 U.S. at 77, 69 S.Ct. at 448.

In this case, women seeking access to one of plaintiffs' clinics for the purpose of having an abortion are a "captive audience" for defendants' "pro-life" message. Women have a constitutional right to choose to have an abortion. In order to safely exercise that right, women must have access to licensed health care facilities that perform abortions. There are a limited number of such facilities in this area. Defendants are well aware of this fact and obviously target their message at women seeking

access to these facilities. Defendants surround the facilities and force women seeking access to them to run a gauntlet of demonstrators, picketers and "sidewalk counselors." The evidence adduced at the hearing clearly shows that, even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message. It is obvious, therefore, that women seeking access to plaintiffs' facilities cannot, as a practical matter, escape defendants' message. Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid receiving defendants' message. The only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion. Thus, women entering plaintiffs' clinics are a "captive audience" for defendants' message and the "cease and desist" provision of the injunction is warranted.[13]

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[13] If, in the future, the Court finds that the "cease and desist" provision is not obeyed, it will not hesitate to impose stricter restrictions on defendants' right to communicate with women entering the clinics. *See Portland Feminist Women's Health Center*, 859 F.2d at 681 (*affirming*, over First Amendment challenge, an injunction setting up at twenty-five foot clear zone around the entrance to the health care facility; no demonstrating of any sort, including counseling, could occur within this clear zone; *see also Bering v. SHARE*, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *Chico Feminist Women's Health Center v. Scully*, 208 Cal. App. 3d 230, 256 Cal. Rptr. 194 (1989); *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 75, 116 L.Ed.2d 49 (1991); *Planned Parenthood Ass'n of Cincinnati v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157 (1990).



The Court notes that the "cease and desist" provision of the injunction is more limited in scope than other restrictions upheld in "captive audience" cases such as *Lehman* and *Kovacs*. In this case, the "cease and desist" provision shields only unwilling listeners from defendants' message. In *Lehman* and *Kovacs*, however, both willing and unwilling listeners were prevented from hearing the speakers' message. Thus, the Court's "cease and desist" provision advances the values of the marketplace of ideas by permitting listeners to exercise their autonomy to make their own determinations among competing ideas. Once a woman seeking access to one of the clinics has made a determination not to listen to defendants' message, defendants must respect her choice.

Paragraph (d) of the injunction prohibits defendants from using any loud speakers or sound amplification devices in order to disturb the patients and staff inside the clinics. The use of such equipment obviously disturbs the calm environment necessary for the rendering of safe health care.

In sum, the Court finds that the restrictions on defendants' expressive activities **[1437]** contained in the injunction are reasonable in light of the functions of plaintiffs' health care facilities and the nature of defendants' past conduct. Further, these restrictions are narrowly tailored to meet several significant government interests, including the need to provide safe health care to women seeking abortions, public safety, and the need to balance the rights of women to choose to have an abortion with defendants' First Amendment rights.

### 3. *Ample Alternative Channels for Communication*

[30] The Court's injunction leaves open ample alternative channels for communication of defendants' message. Defendants may still assemble near plaintiffs' clinics so long as they remain outside the fifteen foot "clear zones." They can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by. If confined to the area fifteen feet away from the entrances of the clinics' driveways and parking lots, defendants and their picket signs will still be visible to people approaching the clinic and their message will still be conveyed.

Paragraph (c) of the injunction allows a maximum of two "sidewalk counselors" to approach people entering the clinics for the purpose of offering them counseling in a non-threatening manner as long as they "cease and desist" from such counseling if the person or group of people targeted indicate that they wish to be left alone. Once the target of the counseling indicates a desire to be left alone, the "sidewalk counselors" must move out of the fifteen foot "clear zone." Once outside the "clear zone," the "counselors" may resume their expressive activity in accordance with the preliminary injunction.

Furthermore, the injunction is intended not only to protect the rights of the women entering the clinics, but those of defendants as well. The injunction specifically states that "nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights ...."

Thus, the Court finds that the injunction leaves defendants ample alternative means for communicating their message.



### D. *Restriction on the Use of Cameras*

[31] Plaintiffs have requested that defendants be prohibited from photographing, or appearing to photograph, with either a still or moving picture camera, any persons entering or exiting plaintiffs' facilities. Plaintiffs argue that the taking of photographs and the videotaping of patients entering the clinics violates the patients' constitutional right to privacy and should be enjoined. There is no precedent, one way or the other, dealing with the taking of photographs or videotapes of patients entering abortion or family planning clinics, and the constitutional right privacy. However, the Supreme Court has dealt with cases involving the conflict between the patient's right to privacy and physician reporting requirements of abortion information to state authorities. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80, 96 S.Ct. 2831, 2846, 49 L.Ed.2d 788 (1976). These decisions evince a strong concern for protecting and maintaining the anonymity of women seeking and undergoing abortions.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 80, 96 S.Ct. 2831, 2846, 49 L.Ed.2d 788 (1976), the Supreme Court upheld a Missouri statute providing reporting and recordkeeping requirements for health care facilities and physicians performing abortions. The Court held that "[r]ecordkeeping and recording requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Id.* at 80, 96 S.Ct. at 2846. The Court found that, because the information to be reported under the Missouri statute was not overdone or burdensome and the records were kept strictly

confidential by state public health **[1438]** officials, the statute was not unconstitutional. *Id.*

In *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), the Court struck down a Pennsylvania law containing a detailed reporting provision for physicians performing abortions.[14] Although these reports were not public records in their original form, the law provided for public inspection and copying of the records after the physician's name was removed and replaced with a confidential identifying number. The Court held that the scope of the information required by the reporting provision and the information's availability to the public belied the state's assertion that it was advancing any legitimate interest. *Id.* at 766, 106 S.Ct. at 2181. The Court found that the reports required under the statute went "well beyond the health-related interests that served to justify the Missouri reports under consideration in *Danforth*." *Id.* The Court stated that "[t]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity." *Id.* In support of this position, the Court quoted with approval Justice Stevens' concurring opinion in *Bellotti v. Baird*, 443 U.S. 622, 655, 99 S.Ct. 3035, 3054, 61 L.Ed.2d 797 (1979), that:

> It is inherent in the right to make the abortion decision that the right may be exercised without

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[14] The reporting provision required physicians performing abortions to file with the state a report identifying the performing and referring physician by name and the facility where the abortion was performed; information about the woman's political subdivision and state of residence; her age, race, marital status, and number of pregnancies, and other information related to gestational age.



> public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.

*Id.* 476 U.S. at 766, 106 S.Ct. at 2181. The Court further found that, while the statute did not require the woman's name to be reported, the obvious purpose of the extreme reporting requirements was to identify women who obtained abortions. Thus, the Court concluded, the statute did not adequately protect the privacy interests of women having abortions and was therefore invalid.

*Thornburgh* and *Danforth* stand for the proposition that information gathering about women having abortions is permissible only if there is a legitimate need for such information and the confidentiality and privacy of the women are closely safeguarded. Based on the authority of *Thornburgh* and *Danforth*, a state could not, consistent with the right of privacy, maintain a file of photographs of women seeking abortion services without taking extraordinary precautions against public disclosure. Any risk of revelation of so uniquely identifying a piece of information as a photograph to anyone other than duly authorized public health authorities would certainly violate the aspect of the right to privacy that includes the right to choose to have an abortion.

It follows, therefore, that if the state cannot do what defendants here do, namely take and disclose photographs and videotapes of women seeking access to abortion services, without seriously infringing the constitutional right of privacy, then certainly defendants, pursuant to their § 1985(3) conspiracy, cannot collect and maintain a photographic record of women seeking access to abortion services. As explained in *Thornburgh* and *Danforth*, the decision to obtain an abortion "is an intensely private one that must be protected in a way that insures

anonymity." *Id.* 476 U.S. at 766, 106 S.Ct. at 2181. It is unavoidable that, in exercising her right to have an abortion, a woman must momentarily travel on a public sidewalk or street in order to get to the doctor's office. However, this fact should not allow defendants to freely intrude upon a woman's right to privacy. What is particularly bothersome is that when the intruder is an individual rather than the government, the use of the photographs and videotapes is left to the sole discretion of the intruder with no concern for the well-being of the woman.

**[1439]** Defendants have suggested that, if the Court decides that some type of injunctive relief is appropriate with regard to the use of cameras, it should only enjoin defendants from: (1) disseminating the photographs and videotapes; and (2) making any effort to identify the patients revealed therein. Defendants argue that such an injunction would ensure the privacy of abortion patients and eliminate any danger of public exposure or identification.

Defendants' argument ignores the intimidating effect of cameras being present at the entrances of the clinics. As stated in the Court's Findings of Fact, defendants use still and video cameras as offensive weapons to intimidate women seeking access to the clinics. Defendants are well aware that women, especially younger women, seeking abortions are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion. Defendants attempt to capitalize on this fear by using cameras as a means to threaten and intimidate these women with the prospect that, if they go through with the abortion, their identities may be revealed.

The Court finds it helpful to draw an analogy between use of cameras in this case and the civil rights movement of the sixties. During the civil rights movement, segregationists congregated in front of schools and polling places with attack



dogs and clubs in order to intimidate blacks into foregoing their constitutional rights to an integrated education and to vote. Here, defendants are attempting to prevent women from exercising their constitutional right to choose to have an abortion. However, instead of using dogs and clubs, defendants use cameras and the threat of exposure to scare and intimidate vulnerable women into foregoing their constitutional rights. While the immediacy and severity of the threat posed by the cameras is obviously less, the camera, like the attack dog, is just a tool used by defendants to intimidate women from exercising their constitutional rights and may be restricted without violating defendants' rights.

In sum, the privacy rights of women entering the clinics and the intimidating effect upon women of cameras being present outside the clinics, are factors that weigh heavily in favor of restricting defendants use of cameras in this case. However, while the Court finds that plaintiffs' request for an injunction against the use of cameras may be warranted, it will decline, at this time, to enjoin or restrain the use of cameras. As stated earlier, there is no clear precedent for such an injunction. The Court will therefore give defendants an opportunity to conform their activities consistent with the Court's concerns over the privacy rights of women entering the clinics and the intimidating effect of cameras being present outside the clinics. If, however, defendants continue to use cameras as offensive weapons to intimidate and harass women entering the clinics, the Court will not hesitate to restrict defendants' use of cameras.

E. *Abstention*

[32] Defendants have moved the Court to reconsider its Decision and Order dated October 29, 1990, denying defendants' motion to dismiss the action based on the abstention doctrine. Defendants assert that such reconsideration is appropriate in light

of the Second Circuit's recent decision in *Temple of the Lost Sheep, Inc. v. Abrams*, 930 F.2d 178 (2d Cir. 1991). The Court has reviewed *Temple of the Lost Sheep* and finds it inapplicable to this case. The plaintiff in *Temple of the Lost Sheep* was given a full and fair opportunity to litigate its federal claims in state court. *Id.* at 184. In this case, however, plaintiffs have not asserted any federal claims in the state court proceeding. Furthermore, for all intents and purposes, the state court proceeding is "dead in the water." Counsel for plaintiffs in that case has submitted an affidavit to this Court stating that "although no motion has been made to dismiss the action and no stipulation of discontinuance has been executed, the action is, for all practical purposes, abandoned." Thus, after reconsideration, the Court denies defendants' **[1440]** motion for dismissal of the action based on the abstention doctrine.

## V. CONCLUSION

For the reasons stated, the Court grants plaintiffs' motion for a preliminary injunction. The preliminary injunction is attached as an Appendix to this Decision and shall also be filed under separate cover. Further, after reconsidering its Decision and Order dated October 29, 1990, the court denies defendants' motion to dismiss the action based on the abstention doctrine.

It is so ordered.

## APPENDIX
## PRELIMINARY INJUNCTION

Upon consideration of the evidence introduced at a hearing held on plaintiffs' motion for a preliminary injunction, and at hearing on plaintiffs' motions to find defendants Nancy Walker, Bonnie Behn, Carl Rainero, Rev. Paul Schenck, Rev.



Robert Schenck and Project Rescue in civil contempt for violations of this Court's Temporary Restraining Order, and upon consideration of the complaint and supporting documents, and upon consideration of defendants' stipulations pertaining to the entry of a preliminary injunction against certain conduct and to the binding nature of any preliminary injunction on all named individual and organizational defendants, it is hereby

ORDERED that defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order, are:

1. Enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility, including, but not limited to, the parking lots, parking lot entrances, driveways, and driveway entrances, at which abortions are preformed in the Western District of New York;

(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

(c) physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed; provided however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. In addition, it is further provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or such reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(d) using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which injures, disturbs, or endangers the health or safety of any patient or employee of a health care facility at which abortions are performed, nor shall any person make such [1441] sounds which interfere with the rights of anyone not in violation of this Order;



(e) attempting, or inducing, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a) through (d) above; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights; and it is further

ORDERED that the defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make a good faith effort to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (e) above;

2. IT IS FURTHER ORDERED that the failure to comply with this Order by any defendant or anyone acting in their behalf or in concert with them shall be subject to civil damages of $10,000 per day for the first violation of this Order and/or may subject them to criminal contempt proceedings; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine and/or criminal contempt proceedings; and is further

ORDERED that any amounts collected thereunder shall be paid to the Plaintiff health care facility at which the violation occurred, or to the Registry of the Court if the targeted health care facility is not a Plaintiff, and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorney's fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.

3. Violations of this Order shall be enforced by appropriate motion.

4. IT IS FURTHER ORDERED that the United States Marshal for the Western District of New York shall read this Order as set forth above in Paragraphs 1 and 2 in their entirety at the site of a demonstration or protest at a facility at which abortions are performed in the Western District of New York. Plaintiffs' counsel shall be responsible for notifying the Marshal in a timely manner of the location of such demonstration or protest activity.

5. It is the Court's intention that nothing contained in this Order shall supersede or diminish the obligation of local and state law enforcement authorities to fulfill their duties and responsibilities in enforcing state laws and local ordinances.

6. This Order shall remain in full force and effect until modified by further Order, or until final resolution by this Court of the claims for permanent injunctive relief in the above captioned matter.



## APPENDIX F

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,**

**Plaintiffs,**

**PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,**

**Intervenour Plaintiff,**

**v.**

**PROJECT RESCUE OF WESTERN NEW YORK, et al.**

**Defendants.**

**No. CIV-90-1004A**

United States District Court
Western District of New York

ORDER TO SHOW CAUSE

Upon the Preliminary Injunction in the above case, granted by this Court and entered in the Clerk's Office of this Court on February 14, 1992, and upon all prior pleadings and proceedings had in the above case, and upon the annexed affidavits of:

GLENN E. MURRAY, ESQ., sworn to on November 13, 1995 (Exhibit A hereto),

LAWRENCE E. PAYNE, sworn to on October 20, 1995 (Exhibit B hereto);
MELINDA DUBOISE, sworn to on October 20, 1995 (Exhibit C hereto);
RICHARD C. WALKNER, sworn to on October 21, 1995 (Exhibit D hereto);
ANNA THIBOUDOU, sworn to on October 21, 1995 (Exhibit E hereto);
MARILYNN BUCKHAM, sworn to on October 23, 1995 (Exhibit F hereto),
and said Preliminary Injunction (Exhibit G annexed hereto); and upon counsel for plaintiffs, Glenn E. Murray, having appeared before this Court on November 28, 1995 and presented argument, and good cause having been shown, it is hereby:

ORDERED, that PHYLLIS WALKER and EVA BOLDT (hereinafter the "alleged contemnors") show cause before this Court why an order should not be entered pursuant to the Federal Rules of Civil Procedure and Rule 83.4 of the Local Rules of the Western District of New York granting plaintiff BUFFALO GYN WOMENSERVICES, INC. the following relief:

1. For their respective conduct at 2500 Main Street in the City of Buffalo of alleged contemnors:

- EVA BOLDT, on October 13, 1995, July 14, 1995, April 7, 1995 and March 3, 1995; and

- PHYLLIS WALKER, on October 13, 1995, April 7, 1995 and March 3, 1995; and



That each and all of the alleged contemnors be charged with and prosecuted for criminal contempt of and pursuant to said Preliminary Injunction and sentenced according to law; and

2. That for the aforesaid conduct, each and all of the alleged contemnors be adjudicated in civil contempt of Court and judgment be granted thereon, including but not limited to a civil contempt sanction of twenty thousand ($20,000.00) dollars each for WALKER and BOLDT, plus reasonable costs and counsel fees;

3. That the Court further fix bail for each and all of the alleged contemnors in the amount of ten thousand ($10,000.00) dollars cash, pending disposition of said criminal proceedings or prosecution;

4. That the Court prohibit each alleged contemnor from approaching within 100 feet of any facility at which abortions are preformed in the Western District of New York.

IT IS FURTHER ORDERED, that the alleged contemnors shall appear before this Court on December 19, 1995, at 9 o'clock in the forenoon of that day, at Part II, 6th Floor, of the United States Courthouse, 68 Court Street, Buffalo, New York, and that in the event of a failure to appear, the United States Marshal's Service shall effect or cause the arrest or the filing of detainers to secure the custody of each and all of the alleged contemnors and the alleged contemnors shall be brought before this Court immediately upon their arrest; and

IT IS FURTHER ORDERED, that personal delivery of this Order To Show Cause and the papers annexed hereto by a U.S. Marshal, deputy U.S. Marshal or by any person who is not a party and who is not less than 18 years of age shall constitute good and sufficient service upon the alleged contemnors served.

Dated: Buffalo, New York
November 28, 1995 /s/
Hon. Richard Arcara, U.S.D.J.

Time granted: 9:20 a.m.



**PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,**

**Plaintiffs,**

**PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,**

**Intervenour Plaintiff,**

**v.**

**PROJECT RESCUE OF WESTERN NEW YORK, et al.**

**Defendants.**

**No. CIV-90-1004A**

United States District Court
Western District of New York

AFFIDAVIT OF GLENN EDWARD MURRAY, ESQ.

State of New York )
County of Erie ) S.S.:
City of Buffalo )

GLENN EDWARD MURRAY, being first duly sworn, states:

1. I am an attorney for the plaintiffs. I submit this affidavit in support of the Order to Show Cause why PHYLLIS WALKER (hereinafter "Walker") and EVA BOLDT (hereinafter "Boldt"), who are named defendants, should not be held in

criminal contempt in violation of Title 18, United States Code, Sections 401(3) and 2, and in civil contempt, for knowing and willful disobedience of this Court's Preliminary Injunction, issued on February 14, 1992, by the Honorable Richard J. Arcara, United States District Court Judge, by doing acts forbidden in paragraphs 1(b), 1(c) and 1(a) and (e) of said order.

2. Alleged contemnors BOLDT and WALKER are regular demonstrators at plaintiff Buffalo GYN Womenservices, Inc. (hereinafter "Womenservices"), an abortion clinic within the Western District of New York.

3. On or about June 28, 1995 BOLDT and WALKER were convicted by a jury verdict of several counts of violating the Preliminary Injunction, for their conduct engaged in by them prior to the conduct described in the current Order to Show Cause. Despite these convictions, for which they are awaiting sentencing, BOLDT and WALKER have continued fagrantly [sic] violating the Preliminary Injunction on several subsequent occasions. Because of their repeated violations and the failure of the prior convictions to deter them, it is essential to place stringent pre-trial release conditions on them, including an order that requires that they not enter a one-hundred (100) foot distance from clinic entrances and doorways.

4. Their respective conduct upon which plaintiff Womenservices seeks relief herein is set forth in the affidavits of:

LAWRENCE E. PAYNE, MD (hereinafter "Payne", Exhibit B),
MELINDA DUBOIS (hereinafter "DuBois", Exhibit C),
RICHARD C. WALKNER (hereinafter "Walkner", Exhibit D),



ANNA M. THIBODEAU (hereinafter "Thibodeau", Exhibit E), and
MARILYNN BUCKHAM (hereinafter "Buckham", Exhibit F).

5. In support of the Order to Show Cause, the following facts and specifications are alleged:

*ALLEGATIONS APPLICABLE TO ALL SPECIFICATIONS:*

6. At all relevant times, Womenservices was a facility at which abortions and related services were performed, located at 2500 Main Street in Buffalo, New York. Womenservices had a doorway entrance and a driveway entrance, both facing Main Street.

7. At all times referred to herein, a civil lawsuit was pending in the Western District of New York under the title (abbreviated) of *Pro-Choice Network of New York, et al v. Project Rescue of Western New York* (the "civil case"), commenced on September 27, 1990 and presided over by the Honorable Richard Arcara, United States District Judge.

8. On or about February 14, 1992, Judge Arcara issued in the civil case a Preliminary Injunction, which, among other things, regulated certain conduct, including but not limited to demonstrating within fifteen feet of driveways and entrances of facilities that provided abortion and related services, and impeding access and egress to such facilities. The Preliminary Injunction only permitted sidewalk counseling within the fifteen feet if "consisting of a nonthreatening nature", and further, such counselors are required to immediately desist from such activity when the person wants not to be counsels [sic] or wants to leave or walk away. *See United States v. Walker*, 94-CR-32S,

Decision & Order, at page 13 (September 28, 1995, unpublished); *See also Pro-Choice Network of Western New York, et al v. Schenck & Saunders*, ___ F.3d ___ (2d Cir., September 28, 1995, Slip Op. at page 7887, n.6) (Injunction contains "cease and desist language" and "requirement that rebuffed 'counselors' retreat to a distance of fifteen from their failed targets.")

9. A copy of the Preliminary Injunction is attached to this affidavit as Exhibit G and is incorporated herein by reference.

10. At all times herein referred to, from and including the dates set forth below, painted yellow lines marked off a distance of approximately fifteen feet from either side of the front doorway and driveway entrances to Womenservices.

11. Set forth below are specifications by which Plaintiff Womenservices seeks charges against EVA BOLDT and PHYLISS WALKER, defendants in the civil case, for six (6) separate incidents occurring at Womenservices:

**Incident #1:: Friday, October 13, 1995:: 11:55 a.m.**

*SPECIFICATION 1. AGAINST EVA BOLDT*

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(a) of the Preliminary Injunction, that is, impeding egress from a driveway at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).



(See affidavit of PAYNE, Exhibit B herein).

*SPECIFICATION 2. AGAINST EVA BOLDT*

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

*SPECIFICATION 3. AGAINST EVA BOLDT*

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of PAYNE, Exhibit B herein).

**Incident #2:: Friday, October 13, 1995:: 9:22 a.m.**

*SPECIFICATION 4. AGAINST EVA BOLDT*

On or about October 13, 1995 at about 9:22 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

*SPECIFICATION 5. AGAINST PHYLISS WALKER*

On or about October 13, 1995 at about 9:22 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of WALKNER, Exhibit D herein).

**Incident #3:: Friday, October 13, 1995:: 11:10 a.m.**

*SPECIFICATION 6. AGAINST EVA BOLDT*

On or about October 13, 1995 at about 11:10 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District



Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

*SPECIFICATION 7. AGAINST EVA BOLDT*

On or about October 13, 1995 at about 11:10 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of WALKNER, Exhibit D herein & Affidavit of DUBOIS, Exhibit C herein).

*SPECIFICATION 8. AGAINST PHYLISS WALKER*

On or about October 13, 1995 at about 11:10 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Prelmininary Injunction, that is, demonstrating within 14 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

*SPECIFICATION 9, AGAINST PHYLISS WALKER*

On or about October 13, 1995 at about 11:55 a.m., in the Western District of New York PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of WALKNER, Exhibit D herein and Affidavit of DUBOIS, Exhibit C herein).

**Incidient #4:: Friday, July 14, 1995:: 10:30 a.m.**

*SPECIFICATION 10, AGAINST EVA BOLDT*

On or about July 14, 1995 at about 10:30 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelimi[illegible]nary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).



*SPECIFICATION 11, AGAINST EVA BOLDT*

On or about July 14, 1995 at about 10:30 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(c) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc. and did continue to "sidewalk counsel" a person who refused counseling and by failing to leave the 15 foot distance from the person sought to be counseled; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of THIBODEAU, Exhibit E herein).

*SPECIFICATION 15, AGAINST PHYLISS WALKER*

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Prelmininary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

**Incident #6:: Friday, March 3, 1995:: 10:00 a.m.**

*SPECIFICATION 16. AGAINST EVA BOLDT*

On or about March 3, 1995, at about 10:00 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Prelmininary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of BUCKHAM, Exhibit F herein).

*SPECIFICATION 17. AGAINST PHYLISS WALKER*

On or about March 3, 1995, at about 10:00 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the Untied States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraphs 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a doorway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See affidavit of BUCKHAM, Exhibit F herein).



WHEREFORE, deponent prays for the relief requested in the Order to Show Cause, annexed hereto.

/s/
Glenn Edward Murray

Sworn to before me this 13th day of November, 1995.

/s/
NOTARY PUBLIC

JULIE A. GRACZ
Notary Public, State of New York
Qualified in Erie County
Commission Expires May, 9, 1996

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,**

**Plaintiffs,**

**PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,**

**Intervenour Plaintiff,**

**v.**

**PROJECT RESCUE OF WESTERN NEW YORK, et al.**

**Defendants.**

**No. CIV-90-1004A**

United States District Court
Western District of New York

Defendants.

AFFIDAVIT OF LAWRENCE E. PAYNE, M.D.
(Incident of Friday, October 13, 1995, 10:50 a.m.,
at 2500 Main Street)

State of New York )
County of Erie ) S.S.:
City of Buffalo )

LAWRENCE E. PAYNE, M.D., being first duly sworn, states:



1. I am an adult resident of Amherst, New York, and a physician providing services to patients of Buffalo Gyn Womenservices, Inc. ("Womenservices"), an abortion clinic, located at 2500 Main Street, Buffalo, New York.

2. On Friday, October 13, 1995, at approximately 10:50 a.m., while within Womenservices, after I had provided services to patients, I was contacted by telephone at Womenservices and I was informed that a Patient of mine there needed medical services, a cesarean delivery on an emergency basis, at Buffalo General Hospital, also located within the City of Buffalo.

3. I promptly walked out the rear entrance door to the parking lot that adjoins Womenservices, where I got in my car and drove to Main Street, using the only driveway that leads from the parking lot to Main Street. At the intersection of the driveway and Main Street I had to stop my car in the driveway because of vehicular traffic I saw traveling downtown, from my left to my right.

**Incident #5:: Friday, April 7:: 11:00 a.m.**

*SPECIFICATION 12, AGAINST EVA BOLDT*

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(a) of the Preliminary Injunction, that is, impeding access to a driveway at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

*SPECIFICATION 13, AGAINST EVA BOLDT*

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, EVA BOLDT, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(b) of the Preliminary Injunction, that is, demonstrating within 15 feet of a driveway entrance at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, Untied States Code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

*SPECIFICATION 14, AGAINST PHYLISS WALKER*

On or about April 7, 1995 at about 11:00 a.m., in the Western District of New York, PHYLISS WALKER, did knowingly and willfully disobey a lawful order of the United States District Court, that is, a Preliminary Injunction issued February 14, 1992, by the Honorable Richard J. Arcara, United States District Judge, by doing acts forbidden in paragraph 1(a) of the Preliminary Injunction, that is, impeding access to a driveway at Buffalo Gyn Womenservices, Inc.; all in violation of Title 18, United States Code, Section 401(3).

(See Affidavit of BUCKHAM, Exhibit F herein).

4. Then, a regular anti-abortion demonstrator, known to me as Eva Boldt, rushed up to the driver side window of my car and held a large sign approximately one foot in front and across of my driver side window. The sign had a color picture of a purported fetus and this sign was approximately



three feet by two feet in size. With this sign, Boldt blocked my view of any oncoming traffic or pedestrians and prevented me from safely exiting the driveway.

5. I inched my car forward a couple of feet forward and Boldt followed me forward, moving the sign so that my view continued to be blocked. I then put my car in reverse and moved it back a couple of feet and she stepped to follow my movement back, again blocking my view with her sign that she continued to hold in front of my side view window.

6. I was concerned about being delayed in responding to my patient's emergency and I was concerned about the danger of an accident with vehicles or pedestrians. I did not feel that it was possible to safely exit the driveway because of Boldt's conduct.

7. I opened my driver side window to tell Boldt to stop what she was doing and she shouted at me "Stop killing babies", or words to that effect. I opened my driver side door, stepped out and told Boldt "Get away-someone's going to get killed", or words to that effect. Boldt shouted at me "What's the difference-you've been killing all day!", or words to that effect. I got back in my car, and because I could then safely turn onto Main Street I proceeded to Buffalo General Hospital, where I learned that other staff had performed the emergency procedure on my patient because of the delay in my arriving at the Hospital.

8. At all times throughout the incident, Boldt was standing within fifteen (15) feet of the driveway entrance and there were no patients within fifteen (15) feet from the driveway entrance and within the yellow lines painted on the pavement that shows the buffer zone established by the court's preliminary injunction.

9. On numerous occasions before this incident, Eva Boldt had shouted at me as I entered or exited Womenservices and she had referred to me as "Doctor Payne" on many of these occasions, when she shouted at me "Stop murdering babies", or words to that effect.

/s/
Lawrence E. Payne, M.D.

Sworn to before me on the 20th day of October 1995.

/s/
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996



**PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,**

**Plaintiffs,**

**PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,**

**Intervenour Plaintiff,**

**v.**

**PROJECT RESCUE OF WESTERN NEW YORK, et al.**

**Defendants.**

**No. CIV-90-1004A**

United States District Court
Western District of New York

AFFIDAVIT OF MELINDA DUBOIS

State of New York )
County of Erie ) S.S.:
City of Buffalo )

MELINDA DUBOIS, being first duly sworn, states:

1. I am an adult resident of Lancaster, New York. I am, and was at all times mentioned herein employed in my capacity as a counseling supervisor at Buffalo Gyn

Womenservices, Inc. ("Womenservices"), an abortion clinic located at 2500 Main Street, Buffalo, New York.

(Incident of Friday, October 13, 1995, 11:10 a.m., 2500 Main Street)

2. On Friday, October 13, 1995, at approximately 11:10 a.m., I had walked out the clinic front door and expressed concern for a patient to Mr. Walkner, a security guard at Womenservices. I was trying to locate a patient who I had been told was distraught. Mr. Walkner and I were standing within the doorway alcove. As I began to speak with Mr. Walkner, I was interrupted by two women, one of whom was much older than the other. Mr. Walkner has identified the older woman as Eva Boldt and the younger woman as Phyliss Walker.

3. Boldt and Walker shouted slogans at me, such as "They're murdering babies in there", or words to that effect. Ms. Walker then stared at my name tag that was pinned to my chest and, as if reading it, recited in a loud voice "Melinda DuBois, Counseling Supervisor". They then both shouted at me, "Aren't you ashamed?" and asked me "How many babies are you going to kill today?", or words to that effect.

4. The loud, abusive and disruptive manner with which Boldt and Walker shouted at me made it difficult to communicate with Mr. Walkner, and this disrupted and delayed the performance of my duties at Womenservices.

5. When Boldt and Walker were shouting at me, they were standing within fifteen (15) feet of the doorway entrance of Womenservices, within approximately ten feet of me and there were no patients within fifteen (15) feet from the door.



6. At no time did I indicate any willingness to communicate with Boldt or Walker.

/s/ _____
Melinda Dubois

Sworn to before me this 20th day of October, 1995.

/s/ _____
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April, 30 1996

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,**

**Plaintiffs,**

**PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,**

**Intervenour Plaintiff,**

**v.**

**PROJECT RESCUE OF WESTERN NEW YORK, et al.**

**Defendants.**

**No. CIV-90-1004A**

United States District Court
Western District of New York

Defendants.

AFFIDAVIT OF RICHARD C. WALKNER

State of New York )
County of Erie ) S.S.:
City of Buffalo )

RICHARD C. WALKNER, being first duly sworn, states:



1. I am an adult resident of Buffalo, New York, and at various times during the past two years I have been assigned security guard duties at 2500 Main Street, Buffalo, New York, in my capacity as an employee of Morris Protective Services, Inc. Located at this address is Buffalo Gyn Womenservices, Inc. ("Womenservices"), an abortion clinic. There, I have observed Phyllis Walker and Eva Boldt on numerous occasions scream and yell at Womenservices' patients and employees and tried to force literature and photographs upon Womenservices' patients or employees who were trying to enter or leave the clinic.

(Friday, October 13, 1995 at 11:10 A.M., 2500 Main Street)

2. On Friday, October 13, 1995, at approximately 9:22 a.m., I observed the following conduct by Boldt and Walker at or near the front doorway entrance to the clinic on Main Street.

3. I observed Boldt and Walker following a young woman and a young male as they walked toward the front doorway entrance of Womenservices. Boldt and Walker started shouting at the couple and the young male shouted back at Boldt and Walker, "Get the Fuck out of my face and leave us alone - we don't want to hear your bullshit" or words to that effect. Boldt and Walker continued to walk immediately behind the couple, following them into the fifteen (15) foot distance from the front doorway entrance. Within the fifteen (15) foot distance, Boldt and Walker were both shouting slogans at the couple such as, Where will you spend eternity?", Don't kill your baby" and Abortion is murder", or words to that effect.

4. At no time did either the young male or the young female indicate any willingness to engage in conversation with Boldt or Walker.

(Friday, October 13, 1995 at 11:10 A.M., 2500 Main Street)

5. On Friday, October 13, 1995, at approximately 11:10 a.m., I observed the following conduct by Boldt and Walker at or near the front doorway entrance to the clinic on Main Street. An employee of Womenservices, Melinda DuBois, had walked out the clinic front doorway exit moments before and spoken to me to express concern for a patient. As I began to speak with Ms. DuBois, we were interrupted by Eva Boldt and Phyllis Walker, who both shouted at Ms. DuBois. Boldt and Walker were shouting slogans, such as "They're murdering babies in there", or words to that effect. Ms. Walker then stared at Ms. DuBois's name tag and, as if reading it, stated in a loud voice "Melinda DuBois, Counseling Supervisor", "Aren't you ashamed?" and "How many babies are you going to kill today?", or words to that effect.

6. When Boldt and Walker were shouting at Ms. DuBois, they were standing within 15 feet of the door, within approximately ten feet of Ms. DuBois, and there were no patients within fifteen (15) feet from the door.



7. At no time did Ms. DuBois indicate any willingness to communicate with Boldt or Walker.

/s/
Richard C. Walkner

Sworn to before me on the 21st day of October, 1995.

/s/
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996.

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,**

**Plaintiffs,**

**PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,**

**Intervenour Plaintiff,**

**v.**

**PROJECT RESCUE OF WESTERN NEW YORK, et al.**

**Defendants.**

**No. CIV-90-1004A**

United States District Court
Western District of New York

AFFIDAVIT OF ANNA THIBODEAU

State of New York )
County of Erie ) S.S.:
City of Buffalo )

ANNA M. THIBODEAU, being duly sworn, deposes and says:

1. On July 14, 1995, I was employed at Buffalo GYN Womenservices, Inc., an abortion clinic at Buffalo, New York (hereinafter the "clinic"). At approximately 11:30 a.m.,



I was leaving the clinic and had walked out the clinic front door, adjacent to Main Street. Mrs. Eva Boldt came up to me and in a loud voice she asked "How many babies are being murdered in there today?" I continued walking away from the clinic and as Mrs. Boldt followed me I said in a clear and audible voice, "Please leave me alone!"

2. Mrs. Boldt continued to follow me, asking, "How many babies are being murdered..." Before she finished speaking, I again said to her in a clear and audible voice, "Please leave me alone."

3. Mrs. Boldt started to say something to me again and I said to Mrs. Boldt, "That's two times, and I will charge you with harassment if you keep bothering me after I tell you I want to be left alone."

4. Mrs. Boldt then said at least twice to me, "You'll never see heaven". I then crossed Main Street to my car and left the vicinity of the clinic.

/s/
Anna M. Thibodeau

Sworn to before me on the 21st day of October, 1995.

/s/
Notary Public

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996.



**PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,**

**Plaintiffs,**

**PLANNED PARENTHOOD OF ROCHESTER AND GENESEE VALLEY,**

**Intervenour Plaintiff,**

**v.**

**PROJECT RESCUE OF WESTERN NEW YORK, et al.**

**Defendants.**

**No. CIV-90-1004A**

United States District Court
Western District of New York

AFFIDAVIT OF MARILYNN BUCKHAM
(Incidents of Friday, April 7, 1995 at 11:00 a.m. and
Friday, March 3, 1995 at 10:00 a.m., 2500 Main Street)

State of New York )
County of Erie ) S.S.:
City of Buffalo )

MARILYN BUCKHAM, being first duly sworn, states:

1. I am the executive director of Buffalo GYN Womenservices, and have held this position since 1983. As executive director, I am the Chief Administrative Officer of Buffalo GYN Womenservices, Inc. ("Womenservices") and am in charge of hiring and training its employees.

2. Eva Boldt and Phyllis Walker are anti-abortion demonstrators who regularly harass me and the staff, patients and physicians of Womenservices.

3. The filing of previous contempt charges against both of them, bail conditions imposed on them and their conviction of violating this court's preliminary injunction has not diminished their conduct that violates the preliminary injunction.

4. One example of such conduct occurred on Friday, April 7, 1995, at approximately 11:00 a.m. I attempted to enter the driveway of 2500 Main Street while driving in my car north down Main Street. As I began making the left turn from Main Street towards the driveway of 2500 Main Street, Phyllis Walker was standing in the apron area of the driveway, thereby causing me to stop with the right flank of my car exposed to oncoming traffic in the opposite lane. I slowly inched the car towards the driveway as Phyllis Walker remained standing there, all the while shouting in an extremely loud voice even though no patients were in the driveway or attempting to enter the building.

5. Phyllis Walker's continued presence in the driveway caused me to remain in my car, with at least a portion of the car exposed to oncoming traffic in the southbound lanes of Main Street. As my car inched up the driveway, Eva Boldt stood at the passenger side of my car and screamed into the front seat. Ms. Boldt's presence there, touching my car, prevented me from driving at an ordinary rate of speed because had I done



so I would have injured her. After about 30 seconds, Phyllis Walker stepped aside, thereby allowing me to continue up the driveway.

6. Phyllis Walker, however, continued to shout and scream in the direction of the parking lot at the end of the driveway, even though no patients were in the area. As she did this she was standing in the driveway within the 15-foot lines.

7. After I got out of my car, I entered the building and walked through the building and around to the front entrance. I stood in the vestibule area of the front door and could see Eva Boldt and Phyllis Walker still standing in the driveway and shouting.

8. On Friday, March 3, 1995, at approximately 10:00 a.m., two young girls entered the clinic through the front entrance. Shortly after they entered, I went into the vestibule area and saw Eva Boldt and Phyllis Walker leaning into the vestibule area from the outside shouting for more than one minute. By this time, the two young girls were well within the building and not any longer within sight of persons standing

outside. During the course of their shouting, I advised Ms. Boldt and Ms. Walker that they were violating the injunction, and I asked them to step back. The did not do so.

/s/
Marilynn Buckham

Sworn to before me on the 23rd day of October, 1995.

/s/
NOTARY PUBLIC

GLENN E. MURRAY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 30, 1996.

Supreme Court, U.S.
FILED
JAN 31 1996
CLERK

No. 95-1065

In The

# Supreme Court of the United States

October Term, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS,

*Petitioners,*

v.

PRO-CHOICE NETWORK OF
WESTERN NEW YORK, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

LUCINDA M. FINLEY
(Counsel of Record)
SUNY at Buffalo Law School
513 O'Brian Hall
North Campus
Buffalo, NY 14260
(716) 645-6152

## QUESTION PRESENTED

1. Whether the en banc U.S. Court of Appeals for the Second Circuit has properly applied the standard established in *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), to the particular record of obstructive and harassing conduct in this case.

## STATEMENT UNDER RULE 29

Respondents are as follows: Pro-Choice Network of Western New York, a not-for-profit membership corporation; Buffalo GYN Womenservices, P.C.; Erie Medical Center; Paul J. Davis, M.D.; Barnett Slepian, M.D.; Morris Wortman, M.D.; Highland Obstetrical Group, P.C.; Alexander Women's Group. None of the respondents are publicly held companies, and no respondent has a parent company or any wholly-owned subsidiaries.



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## OPINIONS BELOW

The only opinion involved in the Petition for a Writ of Certiorari is the *en banc* decision of the U.S. Court of Appeals for the Second Circuit entered on September 28, 1995 and published at 67 F.3d 377 (2d Cir. 1995). In an order dated December 27, 1994 the Second Circuit granted rehearing *en banc* limited to two aspects of an earlier panel decision entered on September 6, 1994: Whether two provisions of a preliminary injunction issued by the U.S. District Court for the Western District of New York were consistent with the First Amendment to the U.S. Constitution. In its *en banc* decision the Second Circuit affirmed the district court. (Petitioners mistakenly characterize the decision as reversing the panel; while that may have been its practical effect, legally the Court was reviewing not the panel decision, but the district court decision.) Since the original panel decision had affirmed the district court in all respects except the two contested provisions of the preliminary injunction, the combined effect of the *en banc* decision and the remaining valid portions of the original panel decision was to affirm the district court *in toto*.

The only portions of the preliminary injunction challenged by Petitioners are the two provisions examined and affirmed by the *en banc* Second Circuit. Thus, the only opinion below for which Petitioners seek a Writ of Certiorari is the one published at 67 F.3d 377 (2d Cir. 1995).

## STATEMENT OF THE CASE

Respondents submit this Brief in Opposition in response to the Petition for a Writ of Certiorari submitted by Petitioners. This Brief provides Respondents' reasons for denying the Writ, and corrects Petitioners' mischaracterization of the actual record developed below, as well as of the scope and effect of the preliminary injunction provisions for which they seek review.

### A. Procedural History

Plaintiffs-Respondents adopt the full statement of the procedural history and facts set forth in the district court opinion, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Pet. App. E, pp. A-138--154), and in the Second Circuit, 67 F. 3d 377, 381-386 (Pet. App. A, pp. A-1 - A-16). Several aspects bear emphasis, because Petitioners have given a misleading or inaccurate account.

Plaintiffs-Respondents are several health care providers in Buffalo and Rochester, N.Y. who offer abortions and other gynecological and reproductive health care services, and the Pro-Choice Network of Western New York, an organization whose purpose is to ensure continued access to safe reproductive health care. The offices of several of the Respondents are located in medical office buildings or in full service hospitals; thus, any demonstration activity outside disrupts not only their health care services, but also that of all of the medical providers. At several of the facilities, on any given day, defendants might be impeding and endangering not just women seeking abortions, but women seeking pre-



natal care for wanted but high-risk pregnancies, women seeking pap smears, people coming to visit their dentist, cardiologist, oncologist, psychologist, or ill loved-one.

Defendants, including the two Petitioners, include organizations and individuals dedicated to disrupting the provision of abortion services through blockades, or "rescues," and a variety of other demonstration techniques designed to impede access to health care facilities and harass their patients and staff. As they admitted in their Answer, all individual defendants had at least one prior arrest and conviction for participating in blockades, trespasses, or incidents in which demonstrators chained themselves together inside the offices of the plaintiffs. The complaint chronicled a series of such blockades at Buffalo and Rochester facilities from 1988 through 1990. Threatened with a published announcement of another such blockade on September 28, 1990, plaintiffs filed on September 24, 1990 a complaint stating one federal and six state law causes of action, and seeking injunctive relief from the threatened blockade and the other types of disruptive activity in which defendants' repeatedly engaged.

The district court granted a temporary restraining order on September 27, 1990, and defendants complied by refraining from a full-fledged blockade the following day. But for Petitioners to now contend before this Court that this is not a "rescue" case because there were no blockades at the Plaintiff facilities before the preliminary injunction issued (Pet. p. 5) defies reality and ignores the complaint and the

reason for granting the TRO.[1] The history of frequent, persistent blockade activity is an important *raison d'etre* for this case and both the TRO and the preliminary injunction.

By stipulation of the parties the TRO remained in effect until the district court could decide the motion for a preliminary injunction. The TRO was less than a month old, however, before plaintiffs filed contempt motions against two defendants, alleging violations. Shortly thereafter, plaintiffs filed two more contempt motions against three additional defendants, including Petitioner Paul Schenck, for three different occasions. Hearings on these contempt motions were held on various days from February, 1991 through January, 1992, and all defendants were found in violation. The evidence adduced at these hearings was included in the record before the district court when ruling on the motion for a preliminary injunction. The contempt violations included conduct such as standing in front of and impeding cars trying to enter a clinic driveway and pinning a patient escort up against a doorway (Schenck); trespassing on a clinic parking lot and impeding and harassing people trying to get to the

[1] It is also doubly disingenuous for Petitioners to contend that no part of this case involves blockades, because shortly after the preliminary injunction was entered, for two weeks in April and May, 1992 defendants and hundreds of others engaged in massive blockades of Buffalo clinics. These events, known as the "Spring of Life," resulted in over 600 arrests, and criminal contempt guilty pleas by five blockade leaders for violating the preliminary injunction. This ongoing thwarting of the preliminary injunction figured prominently in the district court's decision not to vacate it, 828 F. Supp. 1018 (W.D.N.Y. 1993), a decision affirmed by the Second Circuit panel.



clinic; stalking patients for the length of a block as they tried to make their way to a clinic, impeding, crowding, and harassing them to tears while ignoring increasingly agitated pleas to be left alone.

The district court also held a preliminary injunction hearing from March 6, 1991 through April 1, 1991, at which numerous witnesses testified to a pattern of ongoing obstructive, harassing, and intimidating activity by defendants, both prior to and after the entry of the TRO. The district court granted a preliminary injunction on February 14, 1992, and an appeal followed that eventually resulted in the Second Circuit decision involved in the Petition.

On September 6, 1994 a panel of the Second Circuit, by a 2-1 vote, affirmed most of the preliminary injunction but struck down two provisions. Respondents filed a Petition for Rehearing En Banc limited to these two contested provisions, and the Second Circuit granted rehearing. The case was briefed and argued anew, and on September 28, 1995, by a 13-2 vote, the *en banc* Court affirmed these two aspects of the preliminary injunction. The majority opinion, written by Judge Oakes, commanded 9 votes. An opinion written by Judge Winter garnered 10 votes, including 6 of the judges who joined the Oakes opinion for the Court. The Winter opinion is designated as a concurring opinion. Judge Jacobs, joined by Judge Mahoney, both of whom also joined the Winter opinion, concurred separately. Judges Meskill and Altimari, the two votes from the original panel, dissented. This Petition seeking review of the *en banc* decision followed.

## B. Statement of Facts

The district court opinion and the *en banc* Second Circuit opinion contain full statements of the facts. But, because Petitioners so studiously ignore or misrepresent the record, several aspects of the evidence and findings are worth repeating here.

Petitioners assert that the injunction was issued "in absence of a showing that access to the facilit[ies] [was] impeded." Pet. p. 10. But the district court found that in addition to the numerous occasions of blockade activity admitted by defendants, see 799 F. Supp. at 1424, Pet. A-146, defendants also engaged in "constructive blockade" activity that was just as impeding and threatening to health and access as full-fledged blockades. The court found that defendants "frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access...", and that the "numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access ... and creates a danger to both the occupants of the cars and the demonstrators themselves. ... On some occasions, the drivers and occupants of the cars trying to enter the clinic parking lots are so intimidated or confused by the demonstrators that they leave the area thereby causing those occupants seeking health care to suffer a delay in obtaining such care." *Id.*

In addition, the court found that demonstrators often throng around pedestrians entering or leaving the facilities "in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff. This activity



causes stress and even physical injury to the patients, patient escorts and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care." *Id.*

The district court also found that when targets decline the attentions or leaflets of demonstrators, the so-called "sidewalk counselors" then get extremely frustrated, and degenerate to yelling at, badgering, intimidating, following and crowding their unwilling targets. The district court also found that the sidewalk counselors almost never respected the wishes of targets to be left alone to walk away in peace. One witness who had been the victim of this sort of behavior described the experience as "like being in the middle of a lynch mob." Another witness, a patient escort, who observed such harassment regularly, characterized it as a "feeding frenzy" around terrified, "absolutely vulnerable" people "engulfed by a large group ... and caught and forced to sort of stand and listen to all of this."

These actual findings, which were supported by substantial and uncontradicted testimony, some of it out of the mouths of defendants' own witnesses, paint a much different picture than the misleading impression portrayed by Petitioners. Far from constituting the "peaceful, non-violent, non-obstructive" speech activities alleged by Petitioners, the record and findings show that impeding, intimidating, and harassing demonstration activity that obstructed traffic and threatened health was the norm, even after the TRO.

The record is also replete with evidence of extensive health risks stemming from defendants' conduct. While Petitioners state that there was no medical testimony, Pet. p.

29, quite the opposite is true. Plaintiffs put on four doctors, one nurse, one expert in behavioral medicine who was not affiliated with any of the parties, and one trained counselor who worked with patients inside the clinics. They all described health risks caused by defendants' intimidating, obstructing, and harassing activities, ranging from delayed surgery or post-surgical appointments, hyperventilation, elevated blood pressure, thrashing on the operating table, and a reduced ability to hear essential health care information. Even defendants put on a doctor, who agreed that delayed abortion procedures presented elevated medical risks. The expert in behavioral medicine, Dr. Alice Hoagland, testified that when unwanted strangers perceived as threatening come within twenty-five feet or less of someone going in for surgery or other medical care, this causes a physical stress reaction. These adverse physical reactions include heightened blood pressure, an immunosuppressive response that may lead to a greater risk of infection, and a reduced ability to absorb and comply with medical instructions. This testimony provides ample support for both challenged injunction provisions.

### C. The Injunction Provisions At Issue

The entire preliminary injunction is reprinted in the Petition Appendix at A-33 -- A-37. Only two provisions are at issue, paragraph 1(b), and a portion of paragraph 1(c). These contested provisions enjoin Petitioners and other defendants from:

> "(b) demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by not more than two persons as specified in paragraph (c) shall be allowed;
>
> (c) ... provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility. ..."

These paragraphs are known as the "buffer zone" and "cease and desist", or "right to walk away" provisions. Petitioners overdramatically claim that these provisions bar all speech on the public sidewalk, and require them to cease

all "counseling" activity once rebuffed. This characterization is patent nonsense.

The buffer zone simply establishes a small area around entrances, cars, and people in order to preserve access and reduce intimidation and physical or visual obstruction of entrances. Its size is less than two car lengths, or approximately the amount of space a car needs to safely turn into a driveway, or the amount of space a person needs to see where a doorway is and to not feel crowded or intimidated from proceeding. This buffer zone is narrower than the 36 foot buffer zone upheld by this Court in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), because that zone had the effect of putting demonstrators completely across the street from the targeted clinic. It also did not allow any defendant to intrude into the buffer zone. Here, in contrast, sidewalk counselors can come within the buffer zone to attempt face to face leafletting or conversation. At every plaintiff facility there remain ample areas of the sidewalks or grassy strips immediately adjacent to the facilities open for demonstration activity, placard-carrying, leafletting, chanting, praying, singing. Virtually no one can traverse the sidewalk next to a clinic without encountering the demonstrators. The demonstrators and their signs remain readily visible and audible to passersby and vehicles and pedestrians coming in to or leaving the facilities.

Under the cease and desist, or right to walk away provision, a sidewalk counselor remains free immediately to turn to anyone else on the sidewalk or driving up to leaflet or talk to them. They remain free to continue to direct words at the original unwilling target from the distance of fifteen



feet, a distance which means that some of their words are still likely to be audible to the target. The only things that defendants cannot do are stalk too closely to an unwilling target, to continue to attempt a face-to-face encounter with them, or refuse to let them pass in peace. Basically, what this provision means is that defendants may try to engage with anyone, even those who don't want an initial encounter, but they have to respect the right of people to refuse their message and walk away. It is narrowly tailored to the evidence in the case, which provided extensive illustrations of how defendants repeatedly intimidated, yelled at, badgered, got in the face of, and crowded around or stalked people who begged to be left alone.

This provision is significantly narrower than the "no approaching anyone within 300 feet of the clinic" proscription struck down in *Madsen*. This Court found that provision too broad because it protected the willing as well as the unwilling listeners, and afforded demonstrators no practical opportunity to try to persuade people. Thus it inevitably swept up in its ambit some peaceful, welcome, communication. Here, there is an unfettered right to approach, even hard by an entrance. The "walk away" requirement applies only once a target indicates, verbally or non-verbally, that they wish to be left alone, and then it only requires the demonstrator to back away a modest distance that still leaves them visible and audible to the target. Since there is no First Amendment right to press one's message or close physical proximity on an unwilling listener, *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970); *Frisby v. Schultz*, 487 U.S. 474 (1988), this injunction provision does not even restrict any protected speech.

## REASONS FOR DENYING THE WRIT

In essence, this Petition attacks the reasoning and holding of this Court's recent decision in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994). There is no reason to review the *Madsen* decision -- it is less than two years old, this is the first federal circuit court decision applying it, there is no conflict with subsequent circuit or district or state court decisions, and nothing else has happened to call into question the propriety of that holding.

To the extent this Petition is not a wholesale attack on the concept of buffer zones or the recognition of a government interest in healthy and safe access approved in *Madsen*, then it is no more than a quibble about the application of *Madsen's* standard to a particular record. The Supreme Court's resources are far too precious to get involved in a routine fact-based dispute about how its general precepts get applied to future concrete cases. Moreover, since the Second Circuit was faced with a record of obstruction, intimidation, health risks, and contempts at least as or even more compelling than the record in *Madsen*, and approved less speech-restrictive injunction provisions, its decision is undoubtedly meritorious.

### I. There is No Reason to Revisit *Madsen* So Soon and There is No Conflict Among Lower Courts

Many of Petitioners' arguments attacking the present



injunction are actually challenges to the *Madsen* decision itself, insofar as what Petitioners really seem to be challenging is the very idea of a buffer zone. For example, Petitioners complain that the buffer zone in the present injunction keeps them off a 15 foot portion of public sidewalks. Yet, they assert, they have a constitutional right to demonstrate anywhere they please on any sidewalk. Pet. p. 20. *Madsen* squarely rejected this proposition, and upheld as sufficiently narrowly tailored to protect significant governmental interests a broader injunction that kept the demonstrators completely off the sidewalks adjacent to the Florida clinic.

In addition, Petitioners complain that the court below considered governmental interests other than securing access to the targeted facilities and public safety; in particular, Petitioners are aggrieved that the lower courts considered a governmental interest in reducing medical risk and protecting the psychological and physical medical safety of people seeking to obtain or render health care. Pet. Pt. IIA, pp. 21-24. In *Madsen*, however, this Court held that the governmental interests implicated by anti-abortion protest activity targeted at clinics or hospitals and people seeking access to them go beyond protecting access and the free flow of traffic. *Madsen* also recognized as significant the governmental interest in protecting "not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S. Ct. at 2526. In addition this Court characterized as significant the governmental interest in protecting "a woman's freedom to seek lawful medical or counseling services." *Id.*

Petitioners also challenge *Madsen* itself when they challenge the lower court's finding that the injunction is content-neutral because its restrictions are justified "without reference to the content of the regulated speech." *Id.* at 2523. *Madsen* held that a very similar injunction, supported by identical governmental interests, and issued in response to a remarkably parallel pattern of conduct, was content neutral.

There is no reason for this Court to grant a Writ that essentially seeks review of such a recent decision as *Madsen*. There have been no changes in First Amendment doctrine in the last year that suddenly call *Madsen's* soundness into question. Nor has the case had sufficient time to percolate among or be called into question by the lower courts; the Second Circuit decision in this case was the first abortion protest injunction case resolved by a federal circuit court after *Madsen*. Moreover, lower courts do not appear to be having any difficulty applying the *Madsen* standard, and there is no conflict among the Circuits or among state courts about the meaning or application of *Madsen*.

While there have been variations in the injunctions or ordinance provisions approved by lower courts, that is to be expected, since *Madsen* mandates a fact-specific inquiry and a tailoring of each injunction to its particular record. Lower federal courts and state courts are in harmony, however, on two fundamental points: 1) that buffer zones of various sizes and scope are permissible after *Madsen*; and 2) that some protection for people seeking access or leaving clinics from the duress of unwanted proximate encounters with demonstrators is warranted so long as all approaches outside the buffer zone are not barred. *See, e.g., Sabelko v. City of*



*Phoenix*, 68 F.3d 1169 (9th Cir. 1995) (upholding ordinance providing that within 100 fett access area to health care facilities, demonstrators must withdraw eight feet away from people who request to be left alone); *Fischer v. City of St. Paul*, 894 F. Supp. 1318 (D. Minn. 1995) (upholding police action fencing off sidewalk in front of clinic in response to threat of Operation Rescue demonstration, based on proven obstruction and disruption of other Operation Rescue events); *United States v. Dinwiddie*, 885 F. Supp. 1286 (W.D. Mo. 1995) (injunction under Freedom of Access to Clinic Entrances Act, erecting buffer zone that pertained to particular demonstrator with history of threatening actions; defendant allowed to come into buffer zone for purely peaceful, non-intimidating or obstructive leafletting or conversation); *Planned Parenthood of Shasta Diablo v. Williams*, 43 Cal. Rptr.2d 88, 898 P.2d 402 (1995) (on remand from Supreme Court after *Madsen*, upholds injunction with buffer zone requiring demonstrators to stand across the street, a distance of 60 feet); *Horizon Health Center v. Felicissimo*, 282 N.J. Super 325, 659 A.2d 1387 (App. Div. 1995) (buffer zone running along length of sidewalk adjacent to clinic; 2 sidewalk counselors allowed within zone, but must stop counseling when target indicates desire to be left alone).

Thus far, after *Madsen*, the court decisions, including that of the Second Circuit, are consistent with each other as well as with this Court's ruling: buffer zones adapted to the particular record and sites are acceptable, and people have the right to be left alone or to be free of unwanted targeted "counseling", and demonstrators can be required to stop such targeted, closely proximate demonstration activity.

## II. This Case Rests on Its Particular Facts and Presents No Novel or Unsettled Constitutional Issues

To the extent that the Petition is not attacking the conclusions of *Madsen*, it does no more than question how the Second Circuit applied the *Madsen* standard to the particular record before it. Petitioners seem affronted that the two challenged injunctive provisions differ somewhat from those in *Madsen*. Yet that is to be expected if courts engage in the necessary tailoring to the record.

*Madsen* established the First Amendment legal standard to be applied to injunctions, and this case presents no new First Amendment issues unaddressed in *Madsen*. Every post-*Madsen* abortion protest injunction case will turn on its facts, and this Court's resources are too precious to become the arbiter of the adequacy of every particular record. The question of the extent to which the record of obstruction and harassment and harm to health and safety in this case is similar to or even more compelling than the record in *Madsen*, while carefully assessed by the Second Circuit, is not worthy of this Court's supervision.

The lack of need to review the sufficiency of the record supporting the present injunction is all the more apparent because of the strong parallels between this record and that in *Madsen*. In both cases, the demonstrators frequently impeded access by congregating in driveways or marching slowly across them, causing cars to slow down or making it difficult for drivers to see the entrance. In both



cases, there was ample evidence that demonstrators targeted people seeking to enter or leave, accosting and yelling at them at close range, creating an abusive "gauntlet" that people would have to run if they wanted to go into a clinic. And, in both cases, the evidence established that these activities of impeding, intimidating, yelling at, and stalking increased medical risks and caused physical and psychological harm to the targets. *Cf.* 799 F. Supp. at 1424-25; 67 F.3d at 388; 114 S.Ct. at 2521. In both cases, the trial courts found that the obstructive and intimidating activity did not abate despite prior injunctive orders.

In addition, in certain key respects the record in the present case is even stronger than *Madsen's*. Here, several individuals were found in contempt for violating the TRO, some on multiple occasions, yet even these enforcement proceedings did not alleviate the problem. There were no contempt adjudications in *Madsen* between the initial injunction and the subsequent more restrictive order. Moreover, here there was a history of full-fledged massive blockades and "chain-gang" invasions of the clinics, and all defendants had been arrested or convicted for such activity. In contrast, in *Madsen*, defendants stipulated that they had never previously blocked access to abortion clinics in the vicinity.

## III. The Second Circuit Decision is Consistent with Established First Amendment Law

A final reason for denying the Writ is that the Second Circuit decision is entirely consistent with *Madsen* and

numerous other well-established First Amendment principles. First, in finding the injunction content-neutral, the Second Circuit correctly found that because the injunction is justified "without reference to the content of the regulated speech," it is content-neutral. No provision of the injunction turns on or is directed at any particular message -- it is directed entirely at Petitioners' conduct. It directs where and how they may demonstrate, it directs them not to make excessive noise, it directs them to respect people's right to refuse and to walk away, and it directs them not to grab, push, shove, crowd, obstruct or impede. The governmental interests underlying the injunction -- preserving access and the free flow of traffic, public safety, securing medical safety and privacy, and protecting targeted captive audiences from duress -- are all well established and specifically approved as valid, content-neutral objectives in *Madsen*.

Petitioners' argue that because their targeted, face-to-face encounters with unwilling people were proven to cause stress and increased medical harm, the purpose of preventing this harm somehow makes the injunction directed at the content of their message. Preventing stress and anxiety to vulnerable targets, they argue, cannot be a content-neutral government purpose. *Madsen* directly repudiates this argument, as do *Frisby v. Schultz*, 487 U.S. 474 (1988); and *International Society for Krishna Consciousness v. Lee*, 505 U.S. ---, 112 S. Ct. 2701 (1992).

No part of the "cease and desist" or "right to walk away" provision is directed at the content of a message; it is aimed solely at the intrusive, intimidating, and impeding conduct of the messenger. No part of the message the



"counselor" seeks to impart is abridged. Once a counselor is rebuffed, she is free to continue imparting any message she wishes from fifteen feet away. All she is prevented from doing is physically confronting people at close range, persistently foisting her unwanted presence on people who want to get away, badgering them, and following too closely. None of this, as the Winter concurring opinion correctly noted, is protected conduct or speech, and it is all independently proscribable as harassment, stalking, tortious assault or intentional infliction of emotional distress. Judge Winter was summarizing well-established, unquestioned legal principles when he noted that "there is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot fairly be described as an attempt at peaceful persuasion." 67 F.3d at 396.

By attacking the "cease and desist" or "walk away" requirement, what Petitioners are really asserting is that they have a First Amendment right to get in someone's face and to stay in their face whether the target wants it or not. But of course, there is no such First Amendment right to close physical proximity to unwilling targets. Rather, in this instance, it is the unwilling targets who have a countervailing First Amendment right to refuse and to be left alone.

There is no First Amendment right to press ideas on unwilling listeners, and "the right of every person to be let alone must be placed in the scales with the right of others to communicate." *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970). There is no First Amendment right to

obstruct people's passage along a street or sidewalk and refuse to let them pass in peace unless they take a leaflet or listen to a message. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Schneider v. State*, 308 U.S. 147 (1939). Moreover, where, as here, the targeted, unwilling recipients are held captive by medical circumstance, the well-established captive audience doctrine, correctly applied by the Second Circuit, warrants the restrictions in this injunction. *Madsen*, 114 S. Ct. at 2526; *Frisby v. Schultz*, *supra*; *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530 (1980); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Kovacs v. Cooper*, 336 U.S. 77 (1949). *Cf. Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (governmental interest in maintaining calm, stress-free atmosphere necessary for health care justifies total ban on union solicitation in any areas of hospital where patients or their companions may be).

The preliminary injunction affirmed by the Second Circuit is a narrowly tailored and carefully balanced effort to respect the rights of both anti-abortion demonstrators and people seeking lawful medical care or other business at the targeted clinics, medical office buildings, or hospitals. It gives the Petitioners and their fellow defendants ample opportunity to protest along most of the sidewalks alongside clinics, and to approach people in an attempt to communicate with them. It requires them merely to keep a fifteen foot area around entrances, cars, and people going in or out clear, in light of the extensive amount and type of obstructive activities they had engaged in. Moreover, while they are free to insert "sidewalk counselors" within this buffer zone in order to attempt face-to-face encounters, the injunction then acknowledges the right of the targeted people to refuse the



encounter and to walk away without molestation or badgering.

There is no need for this Court to exercise its supervisory powers to review such a narrow and balanced injunction already found constitutional by fourteen federal judges. To do so would be purely an academic exercise.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: February 1, 1996

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Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

(3)

No. 95 - 1065

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS,

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK,
ET AL.,

Respondents.

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# REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

### I. INTRODUCTION

Respondents contend that the Petitioners are attacking "the reasoning and holding of this Court's recent decision in *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994)." Brief in Opposition [hereinafter "Opp."] at 12. Respondents further contend, that, to the extent the petition is not a wholesale attack on *Madsen*, "it is no more than a quibble about the application of *Madsen's* standard to a particular record." Id.[1]

This is simply not true. The decision below raises several major doctrinal questions of law under the First Amendment. Factual "quibbling" aside, the En Banc Second Circuit has as a matter of law, constructed a "pseudo-*Madsen*" which not only departs in clear and crucial respects from this Court's *Madsen* decision, but nullifies the heart of the First Amendment - the public forum doctrine - as well as this Court's longstanding tradition of protecting despised speech.

The petition for certiorari should be granted to prevent *Madsen's* replacement with a pseudo-*Madsen*, under which virtually any speech restriction on a public sidewalk, whether outside an abortion facility or anywhere else, can be upheld.

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[1] Respondents' position is highly ironic. In the Second Circuit, Respondents had no qualms about arguing that the case presented a "question [which] is a recurring matter of exceptional legal and medical importance." Petition for Rehearing and Suggestion for Rehearing in Banc at 1.

## II. THE INJUNCTIVE RESTRICTIONS BURDEN SUBSTANTIALLY MORE SPEECH THAN NECESSARY TO SERVE LEGITIMATE GOVERNMENTAL INTERESTS

In their opposition, Respondents recount portions of the district court's findings concerning the Petitioners' "constructive blockade" of abortion facilities. What Respondents fail to note is that virtually all the complained-of behavior is prohibited under other provisions of the injunction, provisions which the Petitioners do not contest.[2]

Thus, the district court found, the Original Panel concurred, and the En Banc Court does not dispute that the demonstrators for the most part complied with the terms of the temporary restraining order, which was in effect for over 16

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[2] The district court itself set out the parameters of the undisputed provisions of the preliminary injunction:

> "Paragraph (a) *covers the full range of defendants' obstructive behavior*, including: obstructing and impeding access to and egress from the clinic, congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving, or interfering with patients and staff as they approach the clinic on foot." Pet. App. at A-169.

Though these provisions of the injunction *by definition* prohibit "the full range" of activity threatening access, the district court at the very outset of the litigation imposed additional provisions severely restricting the petitioners' free speech rights. Then, in its ruling on the preliminary injunction, the court added yet more restrictions.



months. Yet, the court found this "unpersuasive" in considering whether the preliminary injunction was justified by the record.[3]

Respondents assert that the no-speech zone imposed by the preliminary injunction "simply establishes a small area around entrances, cars, and people in order to preserve access and reduce intimidation and physical or visual obstruction of entrances." Opp. at 10. In reality, the no-speech zone is not a single zone, but a constantly floating and fluctuating cluster of zones which surround each customer and vehicle approaching and leaving the abortion clinic.

Respondents assert that, under the cease and desist provision, Petitioners "remain free to continue to direct words at the original unwilling target from the distance of fifteen feet, a distance which means that some of their words are still likely to be audible to the target." Opp. at 10-11. Thus, even Respondents concede that the ability of Petitioners to communicate with persons fifteen away is reduced to the mere *likelihood* that *some* of their words will be heard.

Respondents also omit all mention of the conduct of their own agents. The record contains ample evidence that Respondents' escorts deliberately interfere with the Petitioners' attempts to communicate with persons entering and leaving the facilities, by raising their voices and physically blocking the Petitioners. *See, e.g.*, Pet. App. at A-148, n.6. Despite this interference, Petitioners are expected to be able to determine

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[3] The Winters Majority is even more perfunctory: "The bullying and planned blockade did not disappear from the record because most of the protestors were on good behavior while the preliminary injunction was under consideration." Pet. App. at A-45. In Judge Winters' opinion, apparently, the petitioners were just pretending to be peaceful and orderly for sixteen months.

when a person, or group, has indicated, "either verbally or non-verbally," that they wish the communication to cease. Pet. App. at A-170. Petitioners then must immediately comply with any perceived indications and withdraw fifteen feet, while being careful not to step into any number of other invisible no-speech zones, in place or floating around customers and vehicles approaching and leaving the facility. Failure to properly interpret and respond to a verbal or non-verbal indication that counseling is not desired carries with it liability for civil and criminal contempt and fines starting at $10,000.

Given that all conduct which impedes access is already prohibited by other provisions of the injunction, it defies reason to assert that these two provisions burden no more speech than necessary to serve a legitimate governmental interest.

### A. The Alleged Governmental Interests Cited By The Lower Court In Upholding The Injunction Are Far Broader Than Those Cited By This Court In *Madsen*

As noted above, the En Banc Court did not dispute that the uncontested provisions of the injunction are sufficient to protect access. However the En Banc Court held that the goal of ensuring the safe performance of abortion justified restrictions on speech activity beyond those necessary to protect unfettered access. The court found persuasive the district court's reasoning that, specifically in the context of abortion facilities, there is a need for "a calm, quiet, stress-free atmosphere." Pet. App. at A-24. The preferential treatment that could cause a federal court to require that an abortion protest site be "stress-free" led dissenting Judge Altimari to call the Oakes Majority opinion "content-based." Pet. App. at A-73.



Respondents and the En Banc Court claim support for this proposition from *Madsen*, where this Court recognized a significant governmental interest in protecting "not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S.Ct. at 2526; Opp. at 13. However, as Judge Meskill notes in his dissent:

> The *Madsen* Court simply recognized that women *in* the clinic were "held 'captive' by medical circumstance," [citation], thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Pet. App. at A-64, n.5 (original emphasis).[4]

Judge Meskill's understanding of this Court's use of the captive audience exception is clearly in keeping with this Court's application of the *Madsen* test to the various injunctive restrictions at issue in that case. For example, this Court stated that "the accepted purpose of the buffer zone is to protect access and to facilitate the orderly flow of traffic on Dixie Way." 114 S.Ct. at 2528.

For that reason, this Court struck down portions of the zone where there was no evidence that the Petitioners had obstructed access or interfered with traffic: "We hold that on the

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[4] The Ninth Circuit, relying on the same language in *Madsen*, has held that "the Supreme Court in *Madsen expressly* recognized that persons *approaching* a health care facility represent a 'captive audience,' . . ." *Sabelko v. City of Phoenix*, 68 F.3d 1169, 1172 (9th Cir. 1995)(emphasis added).

record before us the 36-foot buffer zone as applied to the private property . . . burdens more speech than necessary to protect access to the clinic." *Id.* This Court did not go on to assess whether these buffer zones served the interest in protecting the physical and psychological well-being of women approaching the clinic. Conversely, the only time when this Court cited the health and well-being of patients was in discussing the prohibitions on noises audible and signs visible to persons inside the clinic.[5]

Thus, the En Banc Court's expansion of the captive audience exception threatens the well-established public forum doctrine.

## III. THE PUBLIC FORUM DOCTRINE MUST BE RESTORED IN THE SECOND CIRCUIT

### A. The Winters Majority Rejects This Court's Decisions In *Organization For a Better Austin v. Keefe* and *NAACP v. Claiborne Hardware*

The Winters Majority repeatedly declares that speech activity that is "coercive" is not constitutionally protected. Pet. App. at A-39, A-40, A-41, A-42, A-43. Yet this Court had held:

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[5] *Cf. Planned Parenthood Shasta-Diablo v. Williams*, 10 Cal.4th 1009, 43 Cal. Rptr. 2d 88, 898 P.2d 402 (1995) petition for cert. filed, No. 95-576 (October 6, 1995) (citing *Madsen's* discussion of noise restriction in upholding injunction confining all speech activity to area across street; state's interest in protecting health and well-being of patients justified zone to prevent "physical confrontations" causing "heightened stress and anxiety" on public sidewalk).



> The claim that the expressions [are] intended to exercise a *coercive* impact . . . does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence Respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.

*Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (emphasis added) (citations omitted).

Similarly, in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910-911 (1982), this Court held, "Speech does not lose its protected character, however, simply because it may embarrass others or *coerce* them into action." (Emphasis added).

The Winters Majority's newly divined "right not to be hassled in public" is dangerously at odds with this Court's prior decisions.

### B. The Winters Majority Rejects This Court's Decisions In *Hustler Magazine v. Falwell*, *Houston v. Hill*, and *Tinker v. Des Moines*

The Winters Majority states: "The timid have a right to go about their business, and it is no embarrassment for a federal court to say so." Pet. App. at A-42. A federal court should be embarrassed, however, to elevate the "right" of the timid "to go about their business" above rights explicitly guaranteed by our Constitution.

This Court has frequently had to admonish lower courts which sought to keep the peace at the expense of the First Amendment:

> In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. [Any] word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

*Tinker v. Des Moines Ind. School District*, 393 U.S. 503 (1969) (citations omitted). *See, also, Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (speech may not be penalized because it "may have an adverse emotional impact of the audience); *Houston v. Hill*, 483 U.S. 451, 462 n. 11 (1987)("if absolute assurance of tranquility is required, we might as well forget about free speech").

In spite of these admonitions, the Winters Majority feels called to protect those going about their lawful business not only from mere "isolated threats or obstructions" but even from the "chilling" effect of televised pictures of such conduct. Pet App. at A-42, A-41. The Winters Majority, in seeking "absolute assurance of tranquility," has indeed forgotten about free speech.

### C. The Winters Majority Expands The Captive Audience Exception To Swallow The Public Forum Doctrine

As noted above, Respondents and the En Banc Court assert that *Madsen* held that women approaching health care facilities are a captive audience. This Court has defined a captive audience as those who are in a place "as a matter of



necessity, not of choice." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). Thus, Respondents contend that women approaching a clinic to exercise their right to reproductive choice do not come as a matter of choice.[6]

This irony highlights the particular danger in the En Banc Court's decision, which danger is immediately illustrated by the Winter Majority. The En Banc Court has held, as a matter of law, that persons approaching abortion facilities are a captive audience, thereby allowing greater restrictions on speech directed at such persons. However, if this particular type of location and audience can be thus singled out, one must ask what other locations might also enjoy such protection. If the activity synonymous in the American lexicon with "choice" can be deemed by a court "a matter of necessity, not of choice," then there must be myriad other locations and activities where people should be considered captive audiences.

The Winter Majority helpfully provides a list of sites and audiences which should also receive this favored status, including "customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention . . . ." Pet. App. at A-41. Undoubtedly many others will come before courts, arguing that they, too, "are not voluntarily exposed to the protests" but are at a location which "they can only avoid at a cost."

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[6] It should be noted that if all women approaching an abortion facility were there "as a matter of necessity, not of choice," then there would be no reason for sidewalk counselors to attempt to speak to them. It is precisely because the women have *chosen* to come for an abortion, and can change their minds, that the picketers and sidewalk counselors are present.

In no uncertain terms, the Winters Majority is calling for the abandonment of the public forum doctrine.

## IV. CONCLUSION

The Court should grant the petition for certiorari.

Dated: New York, NY.
February 19, 1996

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 30 1996
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(4)

No. 95-1065

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK
and DWIGHT SAUNDERS,

*Petitioners,*

-v-

PRO-CHOICE NETWORK OF
WESTERN NEW YORK, et al.,

*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 27, 1995
CERTIORARI GRANTED MARCH 18, 1996

15608

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The following documents are reproduced in the Appendix to the Petition for Writ of Certiorari:

A. Decision of Second Circuit in Banc (9/28/95) .... A-1

B. Decision of Second Circuit Panel (9/6/94) ..... A-79

C. Decision of Second Circuit in Contempt Appeals, *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) ..... A-116

D. Decision and Order (Preliminary Injunction) .. A-134

E. Order to Show Cause (Contempt – Phyllis Walker and Eva Boldt) (dkt. 486) ..... A-187

Note: The text of the preliminary injunction appears as an appendix both to the In Banc decision of the Second Circuit and to the Decision and Order of Feb. 14, 1992 of the District Court. The preliminary injunction is thus set forth in the Appendix to the Petition for Writ of Certiorari at A-33 and again at A-182.



## RELEVANT DOCKET ENTRIES

### I. U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK
No. Civ. 90-1004A

| Date | No. | Proceedings |
|---|---|---|
| 9/24/90 | 1 | Filed Complaint |
| 9/24/90 | 2 | Filed Memorandum of Points and Authorities in Support of Pltfs' Motion for a Preliminary Injunction or in the Alternative for a TRO |
| | * * * | |
| 9/24/90 | 3 | Filed Order directing defts to appear on 9/26/90 at 10:00 a.m., Part II and show cause why an order should not be entered pursuant to Rule 65 granting pltfs a TRO and/or Preliminary Injunction, etc. – Arcara, DJ * * * (dkt'd 9/25/90) F-348 |
| | * * * | |
| 9/27/90 | 12 | Filed Order temporarily enjoining and restraining defendants in any manner from trespassing, physically abusing or harassing persons entering any facility at which abortions are performed, etc. ordered that failure to comply with this Order shall subject participants to civil damages of $10,000 per day; directing U.S. Marshal to read TRO at site of demonstration; setting trial date for 10/4/90 at 10:00 a.m. – Arcara, DJ * * * (dkt'd 9/27/90) F-348 |

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| 9/26/90 | – | Oral argument on Pltf's motion for TRO; * * * pltf's motion for TRO is also granted; pltfs to prepare order and return to Court on 9/27/90 at 10:00 am; a PI hearing is scheduled for 10/4/90 at 10:00 am |
| 9/27/90 | – | Meeting w/counsel; court signs order granting motion for TRO |
| 10/2/90 | 13 | Filed Transcript of Proceedings before Judge Arcara on 9/27/90 |
| | * * * | |
| 10/4/90 | 17 | Filed Order extending court's TRO until 10/19/90 at 5:00 pm or such time as Court rules on defts' motion to dismiss, etc. – Arcara, DJ * * * (dkt'd 10/5/90) F-349 |
| 10/4/90 | – | Preliminary injunction hearing – adj. generally; defts to file motion to dismiss by 10/9/90; pltfs to file their response by 10/16/90; oral argument on motion to dismiss will be heard on 10/19/90 at 2:00 pm; pltfs to prepare order extending TRO to 10/19/90 until motion to dismiss is decided |
| 10/10/90 | 18 | Filed defts' Notice of Motion for Dismissal and Atty's Fees (ret 10/19/90) with Affidavit of James J. Duane |
| | * * * | |
| 10/16/90 | 22 | Filed transcript of proceedings held before Judge Arcara on 10/4/90 |



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| | * * * | |
| 10/17/90 | 24 | Filed Amended Complaint |
| | * * * | |
| 10/22/90 | 29 | Filed plfts' Motion for Contempt Agnst the Order of this Court by defts Bonnie Behn & Carla Rainero |
| | * * * | |
| 10/22/90 | 32 | Filed Petition for Contempt Proceeding for Violation of TRO |
| 10/19/90 | – | Oral argument on deft's motion to dismiss; decision is reserved; parties are to submit letters to the court by noon on 10/22/90 summarizing their argument; TRO remains in effect |
| | * * * | |
| 10/29/90 | 34 | Filed Decision & Order denying defts' motion for this court to abstain from exercising its jurisdiction & either stay or dismiss the complaint; directing the parties to be present for a preliminary injunction hearing on 11-2-90 at 10:00; the TRO issued on 9-27-90 will remain in full force & effect; stating that defts' are not entitled to attys' fees as they are not the prevailing party, etc. – Arcara, DJ * * * (dkt'd 10/29/90) F-349 |
| 11/2/90 | 35 | Filed Order extending the Court's TRO and same shall remain in full force & effect until the conclusion of the hearing scheduled to commence 11-15-90, & the determination of the motion for a preliminary injunction. – Arcara, DJ * * * |

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| | | (dkt'd 11-7-90) F-350 |
| 11/5/90 | 36 | Filed Pltfs' 2nd Amended Complaint |
| | * * * | |
| 11/2/90 | – | Meeting with counsel; defense counsel requests an adjournment of the PI hearing; court grants request and reschedules the hearing for 11/15/90 at 10:00 am (and 11/16/90 if necessary); deft agrees to extending the TRO until 11/16/90 – pltfs to prepare an order |
| | * * * | |
| 11/13/90 | 38 | Filed defts' Demand for Jury Trial |
| 11/15/90 | – | Preliminary injunction hearing – adj. to 11/29/90 |
| | * * * | |
| 12/6/90 | 40 | Filed pltfs' Motion for Contempt Against the Order of this court by deft Nancy Walker |
| 12/6/90 | 41 | Filed pltfs' Petition for Contempt Proceeding for Violation of TRO |
| | * * * | |
| 12/14/90 | 44 | Filed plfts' Motion for Contempt Against the Order of this Court by deft Nancy Walker |
| 12/14/90 | 45 | Filed Plfts' Petition for Contempt Proceedings for Violation of TRO |
| 1/30/91 | – | Contempt hearing; adj. generally |
| | * * * | |
| 2/11/91 | – | Contempt hearing; pltfs call A. Schruefer, D. Warnes & E. Sholes; pltfs rest; deft calls M.A. Romanowski & Bonnie Behn; hearing will continue on 2/12/91 at 10:00 am |



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| 2/12/91 | – | Contempt hearing; defts call V. Olczak, M. Prestia & S. Jerge; hearing will continue on 2/13/91 at 10:30 am |
| 2/6/91 | – | Contempt hearing on petition for contempt proceeding for violation of TRO re deft Nancy Walker; opening statements by pltfs & defts; plfts call L. Baker, R. Harvey & P.J. Davis, M.D.; hearing adj. to 2/8/91 at 10:30 am |
| 2/8/91 | – | Contempt hearing continues; pltfs call L. Orlowski, C. Smith, M. Buckham & C. McGuire; Hearing is adj. to 2/11/91 at 10:30 am |
| 2/13/91 | – | contempt hearing; defts call N. Walker; hearing will continue on 2/14/91 at 9:15 a.m. |
| 2/27/91 | 48 | Filed defts' Answer to second amended complaint |
| 2/14/91 | – | Contempt hearing; defts recall Nancy Walker; as rebuttal witnesses, pltfs call L. Baker, R. Harvey, C. Smith & E. Sholes; defts call surrebuttal witness B. Behn; summations by counsel for pltfs & defts |
| | * * * | |

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| 2/28/91 | – | Final pretrial conference – adj. to 3/4/91 at 5:00 pm |
| 3/1/91 | 49 | Filed Order directing * * * in contempt proceeding against deft. Nancy Walker * * * oral argument by counsel of contempt proceeding scheduled for 4/19/91 at 9:30 am; if case not settled by 2/28/91 counsel shall meet w/court on that date at 5:00 pm for pretrial conference; trial of PI shall commence on 3/6/91 at 10:30 am Arcara, DJ * * * (dkt'd 3/5/91) F-354 |
| 3/4/91 | – | Final pretrial conference; defts' oral motion for deft Nancy Walker to proceed ifp is denied with leave to renew at a later date. |
| | * * * | |
| 3/6/91 | 57 | Filed Transcript of Proceedings before Judge Arcara on 2/6/91 (1) |
| 3/6/91 | 58 | Filed Transcript of Proceedings before Judge Arcara on 2/8/91 (200) |
| 3/6/91 | 59 | Filed Transcript of Proceedings before Judge Arcara on 2/8/91 (284) |
| 3/6/91 | 60 | Filed Transcript of Proceedings before Judge Arcara on 2/11/91 (436) |
| 3/6/91 | 61 | Filed Transcript of Proceedings before Judge Arcara on 2/11/91 (549) |



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|---|---|---|
| 3/6/91 | 62 | Filed Transcript of Proceedings before Judge Arcara on 2/12/91 (679) |
| 3/6/91 | 63 | Filed Transcript of Proceedings before Judge Arcara on 2/13/91 (881) |
| 3/6/91 | 64 | Filed Transcript of Proceedings before Judge Arcara on 2/13/91 (992) |
| 3/6/91 | – | Preliminary injunction hearing; pltfs call Helen Dalley; hearing is adj. to 3/7/91 at 11:00 am |
| 3/7/91 | – | Preliminary injunction hearing; pltfs call Deborah Warnes; hearing is adj. to 3/8/91 at 10:30 am |
| 3/8/91 | – | Preliminary injunction hearing; pltfs call Elizabeth Sholes; hearing is adj. to 3/13/91 at 10:30 am |
| 3/11/91 | 65 | Filed Transcript of Proceedings before Judge Arcara on 2/14/91 (1140) |
| 3/12/91 | 66 | Filed defendants' Stipulations |
| | * * * | |
| 3/13/91 | 68 | Filed pltfs' Motion to amend Second Amended Complaint |
| 3/13/91 | – | Preliminary injunction hearing; Elizabeth Sholes remains on witness stand; pltfs call Gerald Carriero and Marilyn Buckham; hearing is adj. to 3/14/91 at 10:30 am |

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| 3/14/91 | – | Preliminary injunction hearing; pltfs call Susan Ward; Marilynn Buckham resumes witness stand; hearing will resume on 3/20/91 at 10:30 am |
| | * * * | |
| 3/20/91 | – | Preliminary injunction hearing; pltfs call Alice Churchill Hoagland, Dr. Paul J. Davis & Dr. Morris Wortman; hearing is adj. to 3/21/91 at 10:00 am; there being no opposition to pltfs' motion to amend the complaint, motion is granted & pltfs are directed to prepare file their 3rd amended complaint |
| | * * * | |
| 3/25/91 | 72 | Filed Third Amended Complaint |
| | * * * | |
| 3/26/91 | 74 | Filed pltfs' Notice of Motion and Motion to Hold Paul Schenck, Robert Schenck and Project Rescue in Civil Contempt for Violation of TRO with Petition for Contempt Proceeding (ret 4/1/91) |
| | * * * | |
| 3/21/91 | – | Preliminary injunction hearing; pltfs call S. Camilleri; pltfs rest; * * * hearing adj. to 3/26/91 at 10:00 am |
| | * * * | |
| 3/26/91 | – | Preliminary injunction hearing; deft moves to dismiss the pltfs' motion for PI – motion denied; defts call Joseph Hurst & Karen Swallow Prior; jearing adj. to 3/27/91 at 10:00 am |
| 3/27/91 | – | Preliminary injunction hearing; defts call Dr. Richard Romanowski & Karen |



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|---|---|---|
| | | Swallow Prior; hearing adj. to 3/28/91 at 10:00 am |
| 3/28/91 | – | Preliminary injunction hearing; Karen Swallow Prior remains on stand; defts call Michael Prestia; hearing adj. to 4/1/91 at 11:00 am |
| | * * * | |
| 4/1/91 | – | Preliminary injunction hearing; Defense witness Michael Prestia resumes stand; defts call Jane Roe & Jane Poe; defts rest; * * * oral argument on pltfs' motion for PI scheduled for 6/6/91 at 9:00 am; pltfs to prepare order outlining dates; contempt hearing re Bonnie Behn & Carla Raniero will commence on 5/3/91 at 10:00 am |
| | * * * | |
| 4/15/91 | 79 | Filed Order directing * * * oral argument of preliminary injunction proceeding will be held on 6/6/91 at 9:30 am, etc. – Arcara, DJ * * * (dkt'd 4/18/91) |
| 4/15/91 | 80a &b | Filed transcript of proceeding held 3/6/91 (2 volumes) |
| 4/15/91 | 81 | Filed transcript of proceeding held 3/7/91. |
| 4/15/91 | 82 &b | Filed transcript of proceeding held 3/8/91. (2 volumes) |

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| 4/15/91 | 83 | Filed transcript of proceeding held 3/13/91. |
| 4/15/91 | 84 | Filed transcript of proceeding held 3/14/91. |
| 4/15/91 | 85 | Filed transcript of proceeding held 3/20/91. |
| 4/15/91 | 86 | Filed transcript of proceeding held 3/21/91. |
| 4/15/91 | 87 | Filed transcript of proceeding held 3/25/91. |
| 4/15/91 | 88a &b | Filed transcript of proceeding held 3/26/91. (2 volumes) |
| 4/15/91 | 89 | Filed transcript of proceeding held 3/27/91. |
| 4/15/91 | 90 | Filed transcript of proceeding held 3/28/91. |
| 4/15/91 | 91 | Filed transcript of proceeding held 4/1/91. |
| 4/15/91 | 92 | Filed transcript of proceeding held 3/20/91. |



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| 4/19/91 | – | Oral argument on pltfs' mtn for contempt-decision reserved; adj. contempt hearing from 5/3/91 to 6/17/91 & 6/18/91. |
| 5/3/91 | – | Contempt hearing adj. to 6/17/91. No appearances. |
| 5/13/91 | 93 | Filed Order directing * * * in PI hearing * * * oral argument will be held on 6/17/91 at 9:30 am, etc. – Arcara, DJ * * * (dkt'd 5/14/91) |
| | * * * | |
| 5/23/91 | 95 | Filed Amended Scheduling Order directing * * * in PI hearing * * * oral argument on 6/17/91 at 9:30 am, etc. – Arcara, DJ * * * (dkt'd 5/14/91) |
| 6/6/91 | 96 | Filed deft's Answer to pltfs' third amended complaint |
| 6/6/91 | – | Oral argument on pltfs' motion for preliminary injunction; adj. to 6/17/91 at 9:30 am |
| | * * * | |
| 6/17/91 | – | Oral argument on pltfs' motion for PI; argument adj. to 6/18/91 at 10:00 am |
| 6/18/91 | – | Further argument on pltfs' motion for PI – decision reserved; contempt hearing re Bonnie Behn & Carla Raniero commences; pltfs call D. Warnes, C. McGuire & M. Buckham; *** contempt hearing will continue on 7/8/91 at 10:00 |

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| | * * * | |
| 7/8/91 | – | Continuation of contempt hearings; witness M. Buckham resumes the stand; pltfs call L. Zorfas, pltfs rest; defts call B. Toth; hearings are adjourned to 7/11/91 at 10:30 am |
| 7/11/91 | – | Continuation of contempt hearings; defts call T. Troy, B. Behn C. Rainero, and R. Krolewicz; defense rests; hearings adj'd to 7/12/91 at 10:00 am |
| 7/12/91 | – | Continuation of contempt hearings; pltfs call as rebuttal witness M. Buckham; * * * oral argument will be heard on 9/13/91 at 9:30 am re scheduling of contempt hearings re both Revs. Schenck, defense atty. is to contact the court to schedule a status conference; defts' motion to extend the stay of discovery will be discussed at the next status conference |
| 7/16/91 | 101 | Filed transcript of proceeding before Judge Arcara on 6/18/91 |
| 7/16/91 | 102 | Filed transcript of proceeding before Judge Arcara on 7/8/91 |
| 7/16/91 | 103 | Filed transcript of proceeding before Judge Arcara on 7/11/91 |
| 7/16/91 | 104 | Filed transcript of proceeding before Judge Arcara on 7/12/91 |



| | | |
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| | * * * | |
| 8/1/91 | 106 | Filed Order denying defts' motion for a stay of discovery pending the outcome of a related case in the U.S. Supreme Court; staying further discovery until the date of this court's decision of pltfs' motion for PI; trial to commence on 10/7/91 at 10:00 am; pretrial conference re contempt motion will be held on 10/4/91 at at 2:00 pm, etc. – Arcara, DJ * * * (dkt'd 8/2/91) F-359 |
| | * * * | |
| 9/13/91 | – | Oral argument before Judge Arcara on pltf's motion for contempt as to Behn and Rainero. Adj'd to 10/5/91, 9:00. No appear. |
| | * * * | |
| 10/4/91 | – | Prehearing conference |
| | * * * | |
| 10/5/91 | – | Oral arguments on motion for contempt; court will reserve decision; deft's atty Duane to accept service of decision for all named defts; Duane to do letter advising Court of preservation of evidence under discovery request |
| | * * * | |
| 10/17/91 | – | Contempt hearings resume with pltfs' witness David Crossland; pltfs pltfs call witness Warnes; hearings adjourned to 10/18/91 at 9:30 am to resume with cross-examination of witness Warnes; |
| 10/16/91 | – | Contempt hearings resume w/pltfs' witness Elizabeth Scholes; pltfs call |

witnesses Carioro & Crossland; hearings adjourned to 10/17/91 at 10:00 am to resume w/cross-examination of witness Crossland

10/18/91 – Contempt hearings resume w/pltfs' witness Warnes, Carriero & Robert Schenck; pltfs rest; defts move to dismiss petition against the Schencks and pltfs' motion to hold defts in contempt be denied; deft joins in motion with respect to Project Rescue & also moves that Project Rescue is not a properly sued party in action; under Rule 41B the court declines to render judgment until presentation of all evidence; * * * hearings adj'd to 10/24/91 at 9:00 am

* * *

10/22/91 117 Filed Transcript of Procceings before Judge Arcara on 10/18/91

10/22/91 118 Filed Transcript of Proceedings before Judge Arcara on 10/15/91

* * *

10/24/91 – Continuation of contempt hearings; hearings resume with deft calling witnesses D. Smith, D. Marriott, J. Prestia & R. Krolewicz; * * * hearings will resume at 10:00 am on 10/25/91 w/witness Krolewicz

10/25/91 – Contempt hearings resume with witness Krolewicz; hearing adjourned to 10/28/91 at 10:00 am * * *



10/28/91 – Contempt hearings resume with deft calling witnesses M. Buckham & Rev. Paul Schenck; hearings adjourned to 10/30/91 at 10:00

10/30/91 – Contempt hearings resume with deft's witness Rev. Robert Schenck; hearings adjourned to 10/31/91 at 9:00 am to continue with witness R. Schenck

10/31/91 – Contempt hearings resume with deft's witness R. Schenck; hearings adjourned to 11/1/91 at 10:00 am

11/1/91 – Contempt hearings resume with deft's witness Rev. Paul schenck; adjd to 11/4/91 at 10:00 am to continue with witness P. Schenck

11/4/91 – Contempt hearings; hearing resumes w/witness P. Schenck; hearings adjourned to 11/5/91 at 10:00 am

11/5/91 – Contempt hearings; hearing resumes w/witness P. Schenck; defense rests; hearing adjd to 11/8/91 at 4:00 pm for oral argument re rebuttal witnesses

* * *

1/3/92 124 MOTION by Pro-Choice Network set Contempt Hearing to hold deft Paul Schenck & Daren Drzymala in civil contempt , Hearing set for 2/5/92 at 9:00 **THIS ITEM IS 124 A** (it) [Entry date 01/09/92] [Edit date 05/26/92]

| | | |
|---|---|---|
| 1/7/92 | – | Minute entry: Hearing cont'd from 11/8/91. Expert witness testimony. Exam. by pla's witness, Albarella. Adj'd to 1/30/92 for testimony of dft's expert. (fm) [Entry date 01/16/92] |
| | * * * | |
| 2/14/92 | 125 | ORDER granting plaintifs' motion for Preliminary Injunction and denying defendants' motion to dismiss action based on the abstention doctrine. ( signed by Judge Richard J. Arcara ) * * * |
| 2/14/92 | 126 | ORDER, for Preliminary Injunction that defts and all other persons acting in their behalf are enjoined & restrained from trespassing, demonstrating, physically abusing, etc. persons entering or leaving any facility at which abortions are performed, etc.; ordered that failure to comply w/order shall subject participants to civil damages of $10,000 per day, etc; that this order shall remain in full force & effect until modified by further order or until final resolution by this Court ( signed by Judge Richard J. Arcara ) * * * |
| 3/11/92 | – | Minute entry:, Hearing set for 5/27/92 at 10:00 & 5/28/92 at 9:00 (it) [Entry date 03/16/92] |
| 3/12/92 | 127 | TRANSCRIPT of proceedings held before Judge Arcara on 10/15/91 (it) [Entry date 03/13/92] |



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| 3/12/92 | 128 | TRANSCRIPT of proceedings before Judge Arcara on 10/16/91 (it) [Entry date 03/13/92] |
| 3/12/92 | 129 | TRANSCRIPT of proceedings before Judge Arcara on 10/17/91 (it) [Entry date 03/13/92] |
| 3/12/92 | 130 | TRANSCRIPT of proceedings before Judge Arcara on 10/18/91 (it) [Entry date 03/13/92] |
| 3/12/92 | 131 | TRANSCRIPT of proceedings before Judge Arcara on 10/24/91 (it) [Entry date 03/13/92] |
| 3/12/92 | 132 | TRANSCRIPT of proceedings before Judge Arcara on 10/25/91 (it) [Entry date 03/13/92] |
| | * * * | |
| 3/13/92 | 134 | MOTION by Paul Schenck, Dwight Saunders to Stay Preliminary Injunction (it) |
| | * * * | |
| 3/13/92 | 136 | NOTICE OF APPEAL by Paul Schenck, Dwight Saunders . Fee Status: Paid $105.00 recceipt #41622 * * * |
| | * * * | |
| 3/20/92 | 138 | TRANSCRIPT of proceedings before Judge Arcara on 10/28/91 (it) |
| 3/20/92 | 139 | TRANSCRIPT of proceedings before Judge Arcara on 10/30/91 (it) |

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| 3/20/92 | 140 | TRANSCRIPT of proceedings before Judge Arcara on 11/1/91 (it) |
| 3/20/92 | 141 | TRANSCRIPT of proceedings before Judge Arcara on 11/4/91 (it) |
| 3/20/92 | 142 | TRANSCRIPT of proceedings before Judge Arcara on 11/5/91 (it) |
| 3/20/92 | 143 | TRANSCRIPT of proceedings before Judge Arcara on 11/8/91 (it) |
| 3/24/92 | 144 | TRANSCRIPT of proceedings before Judge Arcara on 10/31/91 at 9:15 a.m. (Vol. 9) (it) |
| 3/24/92 | 145 | TRANSCRIPT of proceedings before Judge Arcara on 1/7/92 (it) |
| 3/24/92 | 146 | TRANSCRIPT of proceedings before JUDGE Arcara on 1/30/92 (it) |
| | * * * | |
| 5/27/92 | – | Minute entry:, Contempt hearings re Daren Dryzmala & Paul Schenck; parties make opening statements, witnesses called; reset Contempt Hearing for 9:00 5/28/92 (it) [Entry date 06/02/92] |
| 5/28/92 | – | Minute entry:, Contempt hearings re Dryzmala & Schenck continue; defts each move to dismiss case for failure to prove; court declines ruling on motions until close of all evidence in case; reset Contempt Hearing (summations) for 2:00 |



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| | | 7/20/92, set Findings of Fact & Conclusions of Law deadline to 7/6/92; any replies to be filed by 7/17/92 (it) [Entry date 06/02/92] |
| | * * * | |
| 6/25/92 | 231 | TRANSCRIPT of proceedings before Judge Arcara on 5/5/92 (it) |
| 6/25/92 | 232 | TRANSCRIPT of proceedings before Judge Arcara on 5/28/92 (it) |
| | * * * | |
| 7/24/92 | 238 | ORDER granting plas' petitions for civil contempt agnst def. Nancy Walker re violations occurring 11/29 & 12/1/90; and for Sanctions imposes $10,000 civil dmgs, $20,000 fine for a total of $30,000 agnst def. Walker. Directing entry of judgment agnst said def in the amt of $10,000, payable to plas. Paul Davis, M.D., & Bflo GYN Womenservice and the remaining $20,000 payment is contingent on any future violations of the Prel. Injun. The court denies plas' petition for civil contempt re violation alleged to have occurred 12/8/90. (signed by Judge Richard J. Arcara ) * * * [Entry date 07/28/92] [Edit date 08/14/92] |
| | * * * | |
| 8/14/92 | 241 | ORDER, granting pltfs' petition for civil contempt agnst defts Behn and Reinero, judgment against both Behn & Rainero in the amt of $10,000 each; granting pltfs' request for Attorney Fees & costs, setting pltfs' filing of Affidavit for attys fees & |

costs deadline to 9/18/92, set defts' responses to 10/16/92 ( signed by Judge Richard J. Arcara ) * * *

* * *

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| 9/14/92 | 250 | ORDER, granting pltfs' petition for civil contempt agnst Rev. Paul Schenck, Rev. Robert Schenck & Project Rescue in the amt of $10,000 each; pltfs' request for attys' fees & costs granted; pltfs to file affidavit of attys' fees & costs by 10/16/92 and defts shall respond by 11/6/92; ( signed by Judge Richard J. Arcara ) * * * |

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|---|---|---|
| 9/28/92 | 263 | ORDER granting pltfs' [124-1] motion for civil Contempt against Paul Schenck & Daren Drzymala; directing Rev. Paul Schenck to pay sum of $20,000 to the Clerk of the Court by 4:30 p.m. on 1/29/93 in the form of a bank check payable to Clerk of the US District Court; Judgment against Rev. Daren Drzymala in the amount of $10,000; set pltfs' Affidavit/Brief of attys' fees & costs deadline to 11/18/92, Defts Schenck & Drzymala's Response to pltfs' Affidavit set for 12/16/92 ( signed by Judge Richard J. Arcara ) * * * |

## II. U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT
## No. 92-7302

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|---|---|
| 3/24/94 | Oral argument (before panel) |



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| 7/22/94 | Letter sent to counsel requesting letter briefs addressing effect of Madsen decision |
| 9/6/94 | Decision (of panel) |
| 9/26/94 | Order (granting ten-day extension of time for filing of petition for rehearing with suggestion for rehearing in banc from Sept. 20, 1994 to Sept. 30, 1994) |
| 10/3/94 | Mandate |
| 10/13/94 | Order (granting leave to file petition out of time and recalling mandate) |
| 10/13/94 | Petition for rehearing and suggestion for rehearing in banc |
| 12/30/94 | Order (granting rehearing in banc limited to certain issues) |
| 2/2/95 | Order (reinstating preliminary injunction as issued on Feb. 14, 1992) |
| 4/17/95 | Oral argument (before in banc court) |
| 9/28/95 | Decision (of in banc court) |
| 10/11/95 | Transcript of in banc argument |

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs,

vs.

PROJECT RESCUE WESTERN NEW YORK, et al.,

Defendants.

TEMPORARY RESTRAINING ORDER

CIV 90-1004A

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Upon hearing held September 26, 1990, and upon the summons and complaint filed herein and the affidavits of Isabel Marcus, Esq., Marilynn Buckham, subscribed and sworn on September 21, 1990, Paul J. Davis, M.D. subscribed and sworn on September 21, 1990, Shalom Press, M.D., David A. Collins, subscribed and sworn on September 20, 1990, Cathleen McGuire, subscribed and sworn on September 21, 1990, Deborah J. Warnes, subscribed and sworn on September 22, 1990, and Lauren Zorfas, subscribed and sworn on September 21, 1990, and the supporting exhibits attached to such affidavits, and the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, all of which are incorporated and attached herein, it is hereby

ORDERED THAT Defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual notice of this Order, are:



1. Temporarily enjoined and restrained in any manner or by any means from:

(a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed; Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person. In addition, provided that this right to sidewalk counseling as defined herein shall not limit the right of the Police Department to maintain public order or reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site;

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of a health care facility where abortions are performed in the Western District of New York, nor shall any person make such sounds which interferes with the rights of

anyone not in violation of this Order;

(d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b) and (c) above; and it is further

ORDERED that nothing in this Order shall be construed to limit Project Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the defendant organization and their officers, and all individual defendants and those acting in concert with them, shall make good faith effort to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated above not to engage or participate in the activities enjoined in paragraphs (a) through (d) above; and it is further

ORDERED that the failure to comply with this Order by any Project Rescue participant or participant in any of the activities enjoined in paragraphs (a) and (d) above with actual notice of the provisions of this Order shall subject him or her to civil damages of $10,000 per day for the first violation of this Order; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fines; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and it is further



ORDERED that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order.

2. IT IS FURTHER ORDERED THAT the United States Marshal for the Western District of New York shall read this Temporary Restraining Order as set forth in Paragraph 1 (in its entirety), at the site of a demonstration or protest at a facility at which abortions are performed in the Western District of New York. Plaintiffs' counsel shall be responsible for notifying the Marshal in a timely manner of the location of such demonstration and protest activity.

3. Violations of this Order shall be enforced by appropriate motion.

4. Plaintiffs shall post security pursuant to F.R.C.P. Rule 65, in the amount of $100.

5. It is the Court's intention that nothing contained in this Order shall supersede or diminish the obligation of local and state law enforcement authorities to fulfill their duties and responsibilities in enforcing state laws and local ordinances.

6. IT IS FURTHER ORDERED THAT personal delivery of this Order, the Summons and Complaint, to a Defendant or a person of suitable ago or discretion at the residence, usual place of abode or office of business, of Defendants named in the complaint, or, if there is no one present, leaving such pleadings and papers in a conspicuous place therein, shall constitute good and sufficient service, upon such Defendants and each of them, service of the Order pursuant to F.R.C.P. Rule 5 and service of the Summons and Complaint pursuant to F.R.C.P. Rule 4.

7. Trial of this matter is scheduled for October 4, 1990 at 10:00 a.m.

/s/ Richard J. Arcara
RICHARD J. ARCARA
United States District Judge

DATED: Buffalo, New York
September 27, 1990
12:35 P.M.



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK,

v.

PROJECT RESCUE,

Civ. 90-1004A
Statement of Clarification
[excerpt of proceeding on Oct. 4, 1990]

We are here to determine whether a temporary restraining order issued by this Court on September 27, 1990 is to be converted into a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Today's hearing was scheduled after last week's proceeding at which plaintiffs and any defendants who appeared were given an opportunity to speak.

As I noted on Wednesday, September 26, 1990, Rule 65 authorizes the issuance of a temporary restraining order ex parte.

Plaintiffs did not request an ex parte proceeding, but did present substantial evidence on Wednesday concerning the difficulty they were experiencing effecting service. Two of the named defendants, Joyce Strigel and John Tomasello, did appear on that day.

I determined that based on the evidence the plaintiffs presented, that the named defendants were planning one or more demonstrations for Friday, September 28, 1990, it was appropriate to proceed with an application for a temporary restraining order despite the unavailability of all the defendants.

On Thursday September 27, defendants, the Rev. Paul Schenck and Dwight Saunders, who is an attorney, also appeared. They were given an opportunity to address the Court concerning the temporary restraining order which the Court had decided to issue at the conclusion of Wednesday's proceeding.

At that time, there was certain dialogue between the Court and the parties which apparently has been used either through misunderstanding or misinterpretation to present certain misrepresentations to the public of the contents and meaning of this Court's order.

I have carefully reviewed my notes and the transcript of last week's proceedings and it was made clear on numerous occasions that it was the function of this Court to apply the law and to give each party a full and fair hearing.

It is precisely because this Court wanted to be fully apprised of the facts of this case that I accorded all parties present an opportunity to speak or to file motions which they or their attorneys deemed appropriate.

It is necessary, however, where a party seeks a temporary restraining order that the Court consider that request expeditiously – indeed it is mandated by the Federal Rules of Civil Procedure.

I fully understood that all defendants who appeared last week were limited in the time available to them to seek legal advice. I also recommended to those individual defendants that they obtain legal counsel and file whatever papers they desired the Court to consider.

To date, the Court has not received any motions or



responses to the plaintiff's papers from the defendants.

Therefore I have decided that the purpose of today's hearing will be to determine whether the temporary restraining order granted last week should be converted to a preliminary injunction.

I would, however, like to address one matter of concern to this Court which I previously alluded to – that either through misunderstanding or misinterpretation of the temporary restraining order there has been created certain misrepresentations of the contents and meaning of this Court's order.

Unfortunately, members of the clergy and the public have concluded, or have been led to believe, that this temporary restraining order infringes upon either the rights of the clergy to preach to their congregations or on the rights of free speech and freedom of religion as guaranteed under the first amendment of the United States Constitution.

This is just not true.

Again, based on review of my notes and the proceedings of last week, it never was intended or expressed by this Court that this order prohibited any clergyman or individual from preaching from the pulpit, quoting from the Bible or practicing any rights protected by the first amendment.

The temporary restraining order is structured to protect the rights of all parties, and is directed to activities at the sites chosen for demonstrations.

The order was specifically addressed to any individual

who interferes with the constitutional rights of others seeking access to various medical facilities and doctors services.

The order also was structured to protect the first amendment rights of those who seek to demonstrate and further provided for demonstrators to engage in limited counseling in conformity with their individual beliefs.

The order of the Court will remain in effect pending the conclusion of this hearing or until a subsequent order is issued.

RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PRO-CHOICE NETWORK OF
WESTERN NEW YORK;
BUFFALO GYN WOMENSERVICES,
P.C.; ERIE MEDICAL CENTER;
PAUL J. DAVIS, M.D., P.C.;
SHALOM PRESS, M.D.; BARNETT
SLEPIAN, M.D., MORRIS
WORTMAN, M.D; HIGHLAND
OBSTETRICAL GROUP;
ALEXANDER WOMEN'S GROUP.

Plaintiffs,

vs.

CASE NO. Civ. 90-1004A

**SECOND AMENDED COMPLAINT**
(Civil Rights)

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO; DELORES GLASER; CARMELINA GOLBA; KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS; NEAL KOCHIS; PAULETTE LIKOUDIS; CHARLES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD



WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

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FIRST CAUSE OF ACTION

(Violation of 42 U.S.C. Section 1985(3)
(Violation of Right to Travel,Right to Obtain Abortion)
(By all Plaintiffs Against all Defendants)

The plaintiffs, by their attorneys, complain of the defendants and allege:

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief under 42 U.S.C. section 1985(3) and state statutory and common law. This complaint is addressed to impending actions directly threatening the health and safety of thousands of women seeking abortions or other gynecological and family planning services in clinics and other facilities in western New York on September 28,

1990 and during the month of October 1990 which has been proclaimed as National Rescue Month by defendant organization Operation Rescue as well as to future actions. Plaintiffs, who include an organization representing women who have been or believe they will be denied access to health care providers, women's health care clinics in western New York, and doctors in western New York, seek a limited injunctive order ensuring that defendants' announced conspiracy does not infringe plaintiffs' constitutional, statutory, and common law rights to obtain and provide abortions and other family planning and medical services and to enjoy protection from tortious interference with their exercise of these rights. Plaintiffs require immediate injunctive relief to forestall a meticulously planned action scheduled for September 28, 1990, called a "rescue" organized by "Project Rescue Western New York" (hereinafter "Project Rescue") as well as continuing actions during National Rescue month (October 1990) proclaimed by Operation Rescue and executed by its local affiliates in western New York (Project Rescue and Project Life of Rochester) and future actions organized by defendant Project Rescue and defendant Project Life of Rochester (hereinafter "Project Life"). These planned actions involve the blockade of family planning clinics and doctors' offices within western New York, and the harassment of patients and staff of these facilities, by defendant organizations and individuals, and others acting in concert with them or on their behalf.

2. Upon information and belief, defendants intend to block access to abortion providers, to obstruct the provision of abortion and other family planning services, and to intimidate, harass and restrain women attempting to use the services of the clinics or individual physicians. Defendants actions are scheduled to take place in western New York on September 28, 1990, at varying times and dates during October 1990 and at unspecified dates in the future but defendants purposely have not indicated



which providers they will specifically target in order to frustrate efforts to protect the affected facilities and patients. Defendants' actions will greatly increase the health risks faced by women seeking counseling, abortions, and other services in the targeted facilities, and therefore plaintiffs require immediate injunctive relief.

## JURISDICTION AND VENUE

3. This court has jurisdiction of the subject matter of this action under 28 U.S.C. section 1331 in that plaintiffs allege violations of federal law. In addition, jurisdiction is proper under 42 U.S.C. section 1985 (3), 28 U.S. 1343 and the doctrine of pendent jurisdiction.

4. Venue in this District is proper under 28 U.S.C. section 1391 (b) because the claims arise here.

## PARTIES

### Plaintiffs

5. Plaintiff Pro Choice Network of Western New York (hereinafter PCN) is a not-for-profit corporation located in Buffalo, New York. It has over four thousand members including women who have utilized family planning and abortion services in western New York or will utilize such services on September 28, 1990 and in the future. PCN is dedicated to maintaining legal and safe access to family planning and abortion services.

6. Plaintiff Buffalo Gyn Womenservices P.C. is a health care facility that provides abortions and other family planning services located in Buffalo, New York. It sues on behalf of itself, its staff and its patients.

7. Plaintiff Erie Medical Center is a health care facility that provides abortions and other family planning services located in Buffalo, New York. It sues on behalf of itself, its staff, and its patients.

8. Plaintiff Paul Davis M.D. is a physician providing abortions and other family planning services in his office located in Amherst, New York. He sues on behalf of himself, his staff, and his patients.

9. Plaintiff Shalom Press M.D. is a physician providing abortions and other family planning services in his offices located in Buffalo, New York and Kenmore, New York. He sues on behalf of himself, his staff, and his patients.

10. Plaintiff Barnett Slepian M.D. is a physician providing abortions and other family planning services in his office located in Amherst, New York and at Buffalo Gyn Womenservices and Erie Medical Center located in Buffalo, New York. He sues on behalf of himself, his staff, and his patients.

11. Plaintiff Morris Wortman M.D. is a physician providing abortions and other family planning services in his office located in Rochester, New York. He sues on behalf of himself, his staff and his patients.

12. Plaintiff Highland Obstetrical Group is a medical group that provides abortions in their offices at Highland Hospital, Rochester, New York. They sue on behalf of themselves, their staff, and their patients.

13. Plaintiff Alexander Women's Group is a medical group that provides abortions in Rochester, New York. They sue on behalf of themselves, their staff, and their patients.



Defendants

14. Upon information and belief, defendant Project Rescue Western New York (hereinafter "Project Rescue") is an unincorporated organization and association of individuals with offices in Buffalo, New York. Its purpose is to organize and coordinate disruptions of the operations of abortion and family planning facilities. It calls these disruptions "rescues". The aim of "rescues" is to prevent clinic employees, physicians or patients from entering health care facilities so as to shut down such facilities. Project Rescue has announced that such a "rescue" will occur in the Buffalo area on September 28, 1990. Project Rescue's literature lists its address as P.O. Box 284, Buffalo, New York 14223, its office telephone number as 716-694-8623 and its hotline number as 716-694-8578.

15. Upon information and belief, defendant Operation Rescue (hereinafter "the Operation") is a group of organizations, including Project Rescue Western New York, and individuals, with offices in Binghamton, New York. Its purpose is to organize and coordinate disruptions of abortion and family planning facilities including the blockade scheduled in the Buffalo area on September 28, 1990. The Operation's literature lists its address as P.O. Box 3214, Binghamton, New York 13902-3214, and its telephone number as 607-723-4012.

16. Upon information and belief, defendant Project Life is an unincorporated organization and association of individuals with offices in Rochester, New York. Its purpose is to organize and coordinate disruptions of the operations of abortion and family planning facilities. It calls these disruptions "rescues". The aim of "rescues" is to prevent clinic employees, physicians or patients from entering health care facilities so as to shut down such facilities. Project Life has organized such disruptions in

Rochester during October 1990 and on numerous past occasions. Its address is 342 Arnett Boulevard, Rochester, New York and its phone number is 716-235-1611.

17. Upon information and belief, defendant Rev. Paul Schenck, acting in concert with the other defendants and others unknown, is a director of Project Rescue. He is also a pastor of New Covenant Tabernacle Church, 345 McConkey Drive, Tonawanda, New York. In his capacity as pastor and in his capacity as one of the leaders of Project Rescue he plans, organizes, directs, coordinates, and participates in, and aids and abets others who participate in disruptions of health care facilities that provide abortion and family planning services. He was arrested and convicted for blockading such a facility at 260 Elmwood Avenue, Buffalo, New York on October 29, 1988, for chaining himself together with certain other named defendants inside the health care facility at 260 Elmwood Avenue, Buffalo, New York, on April 7, 1989, and for blockading at 1241 Main Street, Buffalo, New York on September 23, 1989. He resides in Tonawanda, New York.

18. Upon information and belief defendant Rev. James Evans, acting in concert with other defendants and others unknown,is a co-ordinator, organizer and participant in, and aider and abettor of, disruptions of health care facilities sponsored by the Operation or by Project Rescue. He has served as an official (Political Liason) of the Operation and he has directed and participated in blockades in Buffalo, New York and in Kenmore, New York. He was arrested and jailed for chaining himself on February 17, 1989 to certain other named defendants inside the facilities operated by plaintiff Doctor Shalom Press, 666 Colvin Avenue, New York. He was present at the October 28, 1989 blockade of plaintiff Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York and on that occasion he was



directing other defendants and other blockaders and was communicating with other leaders with a walkie-talkie device. He is a resident of Binghamton, New York.

19. Upon information and belief, defendant Ted Cadwallader, acting in concert with other defendants and others unknown, is a co-ordinator, organizer and participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade of plaintiff Doctor Shalom Press' office, 666 Colvin Avenue, Kenmore, New York on February 17, 1989 and for chaining himself together with certain other named defendants inside the health care facilities at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989. He resides in Tonawanda, New York.

20. Upon information and belief, defendant Dwight Saunders, acting in concert with other defendants and others unknown, is a co-ordinator, organizer and participant in and aider and abetter of disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. Defendant Saunders is an attorney with law offices at 5695 Main Street, Williamsville, New York, who has encouraged, incited, and counselled other defendants named and others unknown to violate the law. He was arrested and convicted for his participation in a Project Rescue blockade at plaintiff Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on October 28, 1989. He was one of the leaders of that blockade. He resided in Tonawanda, New York.

21. Upon information and belief, defendant David Anderson, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions

of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at 1241 Main Street, Buffalo, New York. He resides in Alden, New York

22. Upon information and belief, defendant Jeffrey Baran, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at 260 Elmwood, Buffalo, New York, and October 28, 1989 at 1241 Main Street, Buffalo, New York. He resides in Clarence, New York.

23. Upon information and belief, defendant Brian Bayley, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at 260 Elmwood, Buffalo, New York, February 17, 1989 at 666 Colvin Blvd., Kenmore, New York, October 11, 1989 at 305 Linwood Avenue, Buffalo, New York, and October 28, 1989 at 1241 Main Street, Buffalo, New York. He resides in Amherst, New York

24. Upon information and belief, defendant Bonnie Behn, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for harassing people at 1241 Main Street, Buffalo, New York on September 16, 1989 and arrested and convicted for criminal trespass at 1241 Main Street, Buffalo, New York on October 31, 1989. She resides in Cheektowaga, New York



25. Upon information and belief, defendant Ronald Breymeier, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elmwood, Buffalo, New York. He resides in Depew, New York

26. Upon information and belief, defendant Gilbert Certo, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for chaining himself together with certain other named defendants inside the health care facility at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989. He resides in Niagara Falls, New York

27. Upon information and belief, defendant Scott Chadsey, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York and for chaining himself together with certain other named defendants inside the same facility on April 7, 1989. He resides in Lancaster, New York

28. Upon information and belief, defendant Kim Day, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services

in the Buffalo area. She was arrested and convicted for participating in blockades on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York, on April 28, 1989 at the facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York, and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She was also arrested and convicted for chaining herself together with certain other named defendants at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York on October 11, 1989. Defendant resides in Kenmore, New York.

29. Upon information and belief, defendant Constance Debo, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on October 28, 1988 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Springville, New York.

30. Upon information and belief, defendant Mark Dent, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

31. Upon information and belief, defendant Wayne Dent, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for



participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

32. Upon information and belief, defendant Paul Diemert, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

33. Upon information and belief, defendant Joan Giangreco, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical Center, 50 High Street, Buffalo, New York and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in North Tonawanda, New York.

34. Upon information and belief, defendant Delores Glaser, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Buffalo, New York.

35. Upon information and belief, defendant Carmelina Golba, acting in concert with other defendants and others

unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for chaining herself together with certain other named defendants at the offices Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York, on October 11,1989, and for trespass during a blockade on February 17, 1990 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. On April 19,1990 she was issued an order of protection in connection with her conviction for her activities on February 17, 1990 and was back in court on charges of violating that order of proptection on May 14, 1990. She resides in Buffalo, New York.

36. Upon information and belief, defendant Kevin Golba, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Buffalo, New York.

36. Upon information and belief, defendant Linda Hall, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Clarence, New York.

37. Upon information and belief, defendant Nancy Hall, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health



care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for chaining herself together with certain other named defendants at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989. She resides in Cheektowaga, New York.

38. Upon information and belief, defendant Thomas Hall, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Clarence, New York.

39. Upon information and belief, defendant Rev. Daniel Hamlin, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Williamsville, New York.

40. Upon information and belief, defendant James Handyside, acting in concert with other defendants and others unknown is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in West Seneca, New York.

41. Upon information and belief, defendant Pamela Huffnagle, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on May 17, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, and September 12, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York. She resides in Buffalo, New York.

42. Upon information and belief, defendant Donna Johanns, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Buffalo, New York.

43. Upon information and belief, defendant Eric Johns, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street,Buffalo, New York. He resides in Lockport, New York.

44. Upon information and belief, defendant Neal Kochis, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for



participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in North Tonawanda, New York.

45. Upon information and belief, defendant Paulette Likoudis, acting in concert with other defendants and others unknowns is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical Center, 50 High Street, Buffalo, New York. She resides in Williamsville, New York.

46. Upon information and belief, defendant Charles McGuire, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York, and for trespass on December 22, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. He resides in Kenmore, New York.

47. Upon information and belief, defendant Christopher Morrow, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Kenmore, New York.

48. Upon information and belief, defendant Annemarie

Nice, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for chaining herself together with certain other named defendants on October 11, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. She resides in Machias, New York.

49. Upon information and belief, defendant Nicholas Pukalo, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York, and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in North Tonawanda, New York.

50. Upon information and belief, defendant Carla Rainero, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on October 11, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. She resides in Tonawanda, New York.

51. Upon information and belief, defendant Thomas Riley, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical



Center, 50 High Street, Buffalo, New York and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

52. Upon information and belief, defendant Patricia Ostrander, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on April 9, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York. She was arrested on February 17,1990 for trespass and given an adjournment in contemplation of dismissal. She resides in Buffalo, New York.

53. Upon information and belief, defendant Linda Ross, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade on October 29, 1988 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York, and on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in East Aurora, New York.

54. Upon information and belief, defendant David Smith, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for trespass on April 9, 1989 at Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York and for disorderly conduct on February 10, 1990 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Kenmore, New York.

55. Upon information and belief, defendant Linda Smith, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for trespass on February 17, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York. She resides in Kenmore, New York.

56. Upon information and belief, defendant Mark Sterlace, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for trespass on February 17, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York and was arrested on April 12,1989 and December 1, 1989 at the Alexander Women's Group offices in Rochester, New York. He resides in Cheektowaga, New York.

57. Upon information and belief, defendant Joyce Strigel, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She resides in Lancaster, New York.

58. Upon information and belief, defendant John Thomann, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for



chaining himself together with certain other named defendants on April 7, 1989 at Buffalo Gyn Womenservices, 260 Elwmood Avenue, Buffalo, New York. He resides in Clarence, New York.

59. Upon information and belief, defendant John Tomasello, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for participating in a blockade on August 25, 1989 at Erie Medical Center, 50 High Street, Buffalo, New York. He resides in Buffalo, New York.

60. Upon information and belief, defendant Paul Waldmiller, Jr., acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and convicted for harassment on September 2, 1989, at Erie Medical Center, 50 High Street, Buffalo, New York. He resides in Snyder, New York.

61. Upon information and belief, defendant Nancy Walker, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. She was arrested and convicted for participating in a blockade or trespassing on February 17, 1989 at the offices of Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York, on September 16, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York, on October 11, 1989 at the offices of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York and on October 31, 1988 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. She

resides in Lancaster, New York.

62. Upon information and belief, defendant Leonard Winter, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Tonawanda, New York.

63. Upon information and belief, defendant Horace Wolcott, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Buffalo area. He was arrested and given an adjournment in contemplation of dismissal for participating in a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York. He resides in Lockport, New York.

64. Upon information and belief, defendant Gerald Crawford, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in Rochester, New York. He was arrested and convicted for participating in a blockade of the office of Doctor Morris Wortman on September 24,1988 in Brighton, New York. He was arrested for blockading the offices of the Alexander Women's Group in Rochester, New York on April 26, 1989, on December 1, 1989, and on March 29, 1990. He resides in or around Rochester, New York.



65. Upon information and belief, defendant David Long, acting in concert with other defendants and others unknown, is a participant in, and aider and abettor of, disruptions of health care facilities that provide family planning and abortion services in the Rochester area. He is one of the leaders of defendant Project Life. He was arrested and convicted for participating in a blockade of the office of Doctor Morris Wortman on September 24, 1988 in Brighton, New York. He was arrested for a blockade of the offices of the Alexander Women's Group on April 12, 1989. He resides in Rochester, New York.

66. Defendants "John Doe(s)" and "Jane Doe(s)" are fictitious names, the real names of said defendants being presently unknown to plaintiffs. These fictitious names are intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

## FACTS

67. Some of the defendants, pursuant to a conspiracy that they have entitled "Project Rescue Western New York" plan to obstruct and close down medical facilities at which abortions are performed in western New York on September 28, 1990 and in the future by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, blocking the path of patients, staff and visitors, and otherwise physically disrupting and interfering with the operations of and access to the facilities.

68. Other of the defendants, pursuant to a conspiracy that they have entitled "Project Life of Rochester" plan to obstruct and close down medical facilities at which abortions are

performed in the Rochester area during the month of October 1990 and in the future by trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from such facilities, blocking the path of patients, staff and visitors, and otherwise physically disrupting and interfering with the operations of and access to the facilities.

69. The defendants do not accept the decisions of the United States Supreme Court that the United States Constitution guarantees and protects a woman's right to choose abortion and to carry out that decision, and they intend to interfere with those rights of women attending the targeted clinics and providers.

70. The defendants do not accept the decision of the United States Supreme Court that the United States Constitution protects a woman's right to travel across state lines to obtain medical care including abortion .

71. Some of the defendants have informed and encouraged others to join with them on September 28, 1990 through a pamphlet announcement of their "Regional Rescue Mission" for western New York and on their hotline telephone message at 716-694-8578.

72. Upon information and belief, and according to the Project Rescue pamphlet, defendants in carrying out the "Rescue" plan to be joined by as many as five hundred (500) others.

73. Defendants' own published plans for the western New York Rescue state specifically that they intend to close down "abortion mills" and specifically to prevent clinic employees or women from entering the clinics. They state that "Previous missions have closed down abortuaries for the day 70% of the time in the Buffalo area...". Defendants' instructions to their co-



conspirators acknowledge that they may be arrested.

74. Defendants have not publicly stated which clinics or facilities in western New York the Rescue will target on September 28, 1990. Defendants keep this aspect of the Rescue secret in order to frustrate attempts to guarantee womens' access to the clinics and providers. Plaintiff PCN organization intends to help protect and guarantee women's access to the facilities during the course of the Rescue, but is frustrated in its attempts to do so by defendants' refusal to identify the targeted facilities.

75. Upon information and belief some if not all of defendant participants in Project Rescue activities plan to attend the D.C. Project II organized in whole or in part by Operation Rescue on November 15-17 in Washington, D.C. Activities planned for the D.C. Project II include a call for "rescuers" to "participate directly in a child saving activity" and a request that " one hundred rescuers in community (to) stay in jail for 45 days."

76. Plans for Operation Rescue were first announced at a Pro-Life Action Network Conference in Atlanta, Georgia in May, 1987. Ever since that time defendants have organized for the Operation and its local supporters in western New York and have distributed flyers inviting others to participate in rescue activities, have staged rallies and other organizing events, and have developed, refined, and utilized blockade and other obstruction techniques at health care facilities providing family planning and abortion services in western New York.

77. Upon information and belief, defendant participants in Project Rescue activities and blockades in western New York act in concert with or are otherwise affiliated with Operation Rescue whose headquarters are located in Binghamton, New

York.

78. Upon information and belief, defendant Rev. James Evans, a resident of Binghamton, New York, and identified with Operation Rescue, was arrested on February 17, 1989 and convicted of trespass and resisting arrest at the medical offices of Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York.

79. Upon information and belief, defendant Rev. James Evans, a resident of Binghamton, New York, and identified with Operation Rescue, acting in concert with western New York resident Dwight Saunders, Esq., directed a blockade on October 28, 1989 at Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York.

80. Participating in Project Rescue events, defendants and others acting in concert with them have engaged in numerous previous blockades or acts of harassment, obstruction, or trespass of medical facilities in western New York delivering family planning and abortion services since October, 1988. Each defendant has been arrested and convicted for one or more offenses committed in connection with such blockades or acts of harassment, obstruction or trespass.

81. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on October 29, 1988 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

81. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry



into and egress from the medical facilities Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York on February 17, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

83. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespassing which included chaining themselves together inside of the medical facilities of Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 7, 1989 thereby impeding law enforcement and disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

84. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Buffalo Gyn Womenservices, 260 Elmwood Avenue, Buffalo, New York on April 9, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

85. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York on April 28, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

86. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Erie Medical Center,

50 High Street, Buffalo, New York on August 25, 1989 disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

87. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for harassment at the medical facilities of Erie Medical Center, 50 High Street, Buffalo, New York on September 2, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

88. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespass at the medical facilities of Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on September 16, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

89. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespass at the medical facilities of Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on September 23, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

90. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for trespass and others were arrested and convicted for chaining themselves together in the offices of the medical facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York on October 11, 1989



thereby impeding law enforcement and disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

91. While participating in a Project Rescue event, certain of the defendants were arrested and convicted for blocking entry into and egress from the medical facilities of Buffalo Gyn Womenservices, 1241 Main Street, Buffalo, New York on October 28, 1989 thereby disrupting and preventing the delivery of all health care services at said facility to patients from western New York, other parts of New York, Pennsylvania and Ohio.

92. Project Rescue, and individual defendants, and others acting in concert with them, intend to engage in similar conduct to the conduct described above, on September 28, 1990 and other future dates. Such conduct is intended to and will have the effect of denying or disrupting women's access to the targeted clinics and their right to travel, with the intended result that many women will have to delay their scheduled medical services. Such conduct is intended to and will have the effect of harassing and causing severe emotional distress to women seeking medical services at the targeted facilities. Such conduct is intended to and will have the effect of disrupting and interfering with the business of targeted facilities. Any delay in the provision of health services relating to childbirth and abortion, or in the provision of certain other gynecological services, increases the health risks faced by the women affected. Such conduct is intended to an will have the effect of causing property damage to plaintiff health care providers and causing them to incur additional protective security expenses. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients' health and safety, and to their rights to travel interstate for the purpose of obtaining health care and their rights

to choose an abortion and to carry out that decision, as well as to the plaintiff clinics' rights to conduct their business without illegal interference.

93. Upon information and belief defendant participants in Project Life activities and blockades in western New York act in concert with or are otherwise affiliated with Operation Rescue whose headquarters are located in Binghamton, New York.

94. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested and convicted for trespass at the medical facilities of Doctor Morris Wortman, 200 White Spruce Boulevard, Brighton, New York on September 24, 1988 thereby impeding law enforcement and disrupting and preventing the delivery of all health care services to patients at said facility.

95. While participating in a Project Life event, certain of the defendants and others acting in concert with them entered Highland Hospital at 855 South Avenue, Rochester, New York, blockaded the offices of the Highland Obstetrical Group located on the fifth floor of this multiple use health care facility and were arrested in May 1988 and convicted for trespass thereby impeding law enforcement and disrupting and preventing the delivery of many types of health care services.

96. While participating in a Project Life event, certain of the defendants and others acting in concert with them entered Highland Hospital at 855 South Avenue, Rochester, New York, blockaded the offices of the Highland Obstetrical Group located on the fifth floor of his multiple use health care facility and were arrested for trespassing in October 1989.

97. While participating in a Project Life event, blockaders



entered Highland Hospital at 855 South Avenue, Rochester, New York, on October 13, 1990, blockaded the offices of the Highland Obstetrical Group located on the fifth floor of this multiple use health care facility thereby disrupting the delivery of health care services. In this instance, the blockaders were ordered to disperse immediately by the Rochester police shortly after the blockade commenced.

98. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on April 12,1989 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

99. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on April 26, 1989 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

100. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on December 1, 1989 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

101. While participating in a Project Life event, certain of the defendants and others acting in concert with them were arrested for trespass at the offices of the Alexander Women's Group, 220 Alexander Street, Rochester, New York on March 29,

1990 thereby impeding law enforcement and disrupting and preventing the delivery of health care services to patients.

102. Project Life, and individual defendants, and others acting in concert with them, intend to engage in similar conduct to the conduct described above during October 1990 and thereafter in the Rochester area. Such conduct is intended to and will have the effect of denying or disrupting women's access to targeted facilities and their right to travel, with the intended result that many women will have to delay their scheduled medical services. Such conduct is intended to and will have the effect of harassing and causing severe emotional distress to women seeking medical services at the targeted facilities. Such conduct is intended to and will have the effect of disrupting and interfering with the business of the targeted facilities. Any delay in the provision of health services relating to childbirth and abortion, or in the provision of certain other gynecological services, increases the health risks to the women affected. Therefore, unless defendants' planned activities are enjoined, substantial and irreparable damage will be done to women patients ' health and safety, and to their rights to travel interstate for the purpose of obtaining health care and their rights to choose an abortion and to carry out that decision as well as to the plaintiff clinics' rights to conduct their business without illegal interference.

103. Plaintiffs have no adequate remedy at law in that monetary damages cannot fully recompense them for the threats and actual injury to their health and safety resulting from defendants' actions and the consequent delays in receiving or providing necessary medical services.

104. Upon information and belief, law enforcement efforts by the police departments of Buffalo, Kenmore and



Amherst have been ineffective in restoring medical services in a timely manner to patients seeking them at plaintiff providers' facilities.

105. Upon information and belief, the Kenmore police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Dr. Shalom Press, 666 Colvin Avenue, Kenmore, New York.

106. Upon information and belief, the Amherst police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Dr. Paul Davis, 1404 Millersport Highway, Williamsville, New York.

107. Upon information and belief, the Buffalo police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Dr. Parviz Taefi, 305 Linwood Avenue, Buffalo, New York.

108. Upon information and belief, the Buffalo police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Erie Medical Center, 50 High Street, Buffalo, New York.

109. Upon information and belief, the Buffalo police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Buffalo Gyn Womenservices, formerly located at 260 Elmwood Avenue, Buffalo, New York with present offices at 1241 Main Street, Buffalo, New York.

110. Upon information and belief, the failure of the Buffalo Police Department has been the subject of a Buffalo Common Council investigation and hearings and of a request by the Buffalo Common Council to the Federal Bureau of Investigation to conduct an investigation of the manner in which the Buffalo Police Department has handled the numerous blockades of plaintiff providers and facilities within the City of Buffalo.

111. Upon information and belief, the Rochester area police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the facilities of Doctor Morris Wortman, 200 White Spruce Boulevard, Brighton, New York.

112. Upon information and belief, the Rochester area police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the provision of services at the Highland Obstetrical Group, 855 South Avenue, Rochester, New York.

113. Upon information and belief, the Rochester area police have been unable to prevent blockading activities from occurring and have been unable to prevent closure or delay in the delivery of services at the Alexander Women's Group, 220 Alexander Street, Rochester, New York.

114. Defendants have conspired together with each other and other parties presently unknown for the purpose of denying women seeking abortions and other family planning services at targeted facilities the equal protection of the laws and the equal privileges and immunities under the law and of obstructing travel, in violation of 42 U.S.C. section 1985(3). Defendants are and continue to be motivated by an invidiously discriminatory



animus directed at women seeking to exercise their constitutional and legal right to choose abortions and other family planning services at the targeted facilities, as well as at all like medical facilities in western New York.

115. No previous application for relief under federal law from the planned activities of organizational and individual defendants has been made in any court.

## SECOND CAUSE OF ACTION

(New York Civil Rights Law, Section 40(c) and
New York Executive Law section 296)
(By all Plaintiffs Against all Defendants)

116. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

117. The actions planned by defendants which are directed at women seeking abortion and other family planning services at the targeted facilities, jointly and individually, violate the laws of New York State, including New York Civil Rights Law, Section 40(c), which prohibits discrimination and harassment in the exercise of civil rights on the basis of sex, and New York Executive Law section 296, which prohibits discrimination in access to and use of public accommodations, including but not limited to health care facilities.

## THIRD CAUSE OF ACTION

(Tortious Interference with Business)
(By all Plaintiff Clinics and Doctors
Against all Defendants)

118. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

119. The actions planned by defendants, jointly and individually, constitute a tortious interference with plaintiffs facilities business.

FOURTH CAUSE OF ACTION

(Trespass)
(By all Plaintiff Clinics and Doctors
Against all Defendants)

120. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

121. The actions planned by defendants, jointly and individually, constitute a tortious intentional trespass on the targeted clinics and abortion providers.

FIFTH CAUSE OF ACTION

(Intentional Infliction of Emotional Harm)
(By all Plaintiffs Against all Defendants)

122. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

123. The actions of defendants, jointly and individually, constitute tortious intentional infliction of emotional harm on patients and employees of the plaintiff clinics and abortion providers.



SIXTH CAUSE OF ACTION

(Tortious Harassment)
(By all Plaintiffs Against all Defendants)

124. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

125. The actions planned by defendants, jointly and individually, constitute tortious harassment of patients and employees of the plaintiff clinics and abortion providers.

SEVENTH CAUSE OF ACTION

(False Imprisonment)
(By all Plaintiffs Against all Defendants)

126. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 115 as if fully set forth herein.

127. The actions planned by defendants, jointly and individually, constitute false imprisonment of patients and employees of the plaintiff clinics and abortion providers.

WHEREFORE, plaintiffS demand judgment, together with costs, fees and disbursements of this action, as follows:

1. Declaring that the planned actions of defendants are violative of plaintiffs' rights to obtain and provide abortions under the United States Constitution and the statutes and common law of New York; and

2. Declaring that the defendants' conduct complained of is violative of the individual women plaintiffs' rights to travel

under the United States Constitution; and

3. Granting plaintiffs a preliminary and permanent injunction restraining and enjoining the defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, in any manner or by any means, from:

(a) trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in western New York, including demonstrating within 15 feet of any person seeking access to or leaving those facilities on September 28, 1990, or the conclusion of a planned blockade called "Project Rescue Western New York," whichever is later;

(b) physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed in New York, on September 28, 1990, or the conclusion of a planned blockade called "Project Rescue Western New York," whichever is later;

(c) making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of the clinics;

(d) attempting, or inducing, encouraging, directing, aiding, or abetting in any manner, others to take any of the actions described in paragraphs (a), (b), and (c) above; and



4. Providing that nothing in the Court's Order should be construed to limit defendants' exercise of their legitimate First Amendment rights; and

5. Directing the defendant organizations and their officers, and all individual defendants and those acting in concert with them, to instruct all members of the conspiracy and organizations believed to be planning to participate in the activities enumerated above not to engage or participate in any such activities enjoined in paragraphs (a) through (d) above; and

6. Providing that the failure to comply with the Court's order by any organizational or individual defendant or any Project Rescue participant with actual notice of the provisions of the Court's order shall be subject to civil damages of $25,000 per day for any violations of the Court's order; and

7. Awarding compensatory damages in an amount to be determined at trial and punitive damages as warranted; and

8. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: Buffalo, New York
November 5, 1990

* Admitted to practice in the District of Columbia



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PRO-CHOICE NETWORK OF
WESTERN NEW YORK, ET AL.,

Plaintiffs,

ANSWER

-vs-

Civil #90-1004A

PROJECT RESCUE WESTERN
NEW YORK, ET AL.,

Defendants.

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Defendants, for their answer to plaintiffs' second amended complaint in this action (referred to herein as "the complaint"):

1. Admit the allegations contained in paragraph 4.

2. Deny the allegations contained in paragraphs 1, 2, 3, 67 through 70, 77, 92, 93, 96, 97, 102 through 109, 111 through 115, 117, 119, 121, 123, 125, and 127.

3. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5 through 13, 66, and 110.

4. Answering paragraph 14 of the complaint, defendants deny the allegations as to the purpose and aims of the defendant, Project Rescue, and deny that it has offices in Buffalo, New York, but otherwise admit the allegations of that paragraph.

5. Answering paragraph 15 of the complaint, defendants deny that Operation Rescue has been properly served with process in this action or is a party to this action, deny that they have or have had any affiliation with that organization, deny that Operation Rescue was involved in the planning of any activities in the Buffalo area on any date, and deny first hand or personal knowledge as to the purposes, activities, or continued existence of that organization.

6. Answering paragraph 16 of the complaint, defendants deny the allegations as to the purpose and aim of the defendant, Project Life, deny that Project Life has organized "disruptions" at any time, or any specific activities in October 1990, and otherwise admit the allegations of that paragraph.

7. Answering paragraphs 17 through 20, and 65 of the complaint, defendants deny that the individuals named in those paragraphs are leaders, directors, coordinators, or organizers of the activities and groups described therein, and deny the allegations as to the actions of those defendants. With respect to the allegations in those five paragraphs as to the arrests and/or convictions of those defendants, defendants do not have a certain recollection of the precise dates and places of those arrests, but refer to the official records of the New York State Judicial System; upon information and belief, however, defendants believe that the dates asserted (other than the alleged arrest on September 23, 1989) are correct.

8. Answering paragraphs 21 through 64, 94, 95, and 98 through 101 of the complaint, defendants deny an exact and precise recollection of the dates and places of their arrests and/or convictions, but refer to the official records of the New York State Judicial System with respect to those dates and well as for the precise reasons for their arrests or convictions; upon



information and belief, however, defendants believe that the dates and places asserted in those paragraphs are accurate. Defendants admit the allegations as to their places of residence in those paragraphs, but deny all other allegations contained in those paragraphs.

9. Answering paragraphs 71 through 73 of the complaint, defendants refer to the specified pamphlets and publications with respect to their contents, deny that any such activities transpired on September 28, 1990, and deny that any present plans exist for any such activities.

10. Answering paragraph 74 of the complaint, defendants deny knowledge and information as to the intentions of the plaintiff, and otherwise deny the allegations of that paragraph.

11. Answering paragraph 75 of the complaint, defendants deny that they have any such present intention, or knowledge of any such present plans.

12. Answering paragraph 76 of the complaint, defendants deny knowledge and information sufficient to permit them to admit or deny the first sentence of that paragraph, and otherwise deny the allegations of that paragraph.

13. Answering paragraphs 78 and 79 of the complaint, defendants deny that Rev. James Evans is identified with Operation Rescue, deny the allegations as to his supposed actions, and refer to the criminal records of the New York State Judicial System as to the exact dates and places of his arrests and/or convictions; upon information and belief, however, defendants believe that the dates asserted are correct.

14. Answering paragraph 80 of the complaint, defendants

admit that each individual defendant has been arrested or convicted for one or more offenses, on the basis of charges which are a matter of public record, but deny that there have been "numerous blockades" and deny that any of the defendants have committed any acts of harassment or obstruction, and otherwise deny the allegations of that paragraph.

15. Answering paragraphs 81 through 91 of the complaint, defendants admit that arrests were made at the specified dates and places (with the exception of September 23, 1989), admit that certain convictions followed for reasons that are a matter of public record, deny that all of the specified arrests constituted "Project Rescue events," and deny each and every allegation concerning the supposed effects and impact of those supposed actions and arrests.

16. Answering paragraphs 116, 118, 120, 122, 124, and 126 of the complaint, defendants repeat and reallege their answers to the preceding paragraphs incorporated by reference therein.

17. Defendants deny each and every other allegation of the complaint not herein specifically admitted or otherwise denied.

FIRST AFFIRMATIVE DEFENSE

18. Some or all of the causes of action in the complaint fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

19. Some or all of the claims in the complaint are barred by the applicable statutes of limitations.



THIRD AFFIRMATIVE DEFENSE

20. Some or all of plaintiffs' claims are barred by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

21. Some or all of plaintiffs' claims are barred by the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

22. Because of the pendency of similar, if not identical, actions in the Courts of New York State, both in Erie County and Monroe County, dismissal of this complaint is required and proper under the abstention doctrine.

SIXTH AFFIRMATIVE DEFENSE

23. Some or all of plaintiffs' claims are barred by the full faith and credit clause of the Constitution, as well as 28 U.S.C. § 1738, as well as the doctrines of res judicata and collateral estoppel, by virtue of the decisions and orders already rendered by State Court Justices in other related cases.

SEVENTH AFFIRMATIVE DEFENSE

24. Some or all of the claims in the complaint are barred by the doctrines of license and waiver.

EIGHTH AFFIRMATIVE DEFENSE

25. Some or all of the relief requested by plaintiffs is inconsistent with the defendants' constitutional rights to freedom

of speech, freedom of religion. and freedom of assembly as guaranteed by the First Amendment to the United States Constitution.

NINTH AFFIRMATIVE DEFENSE

26. Upon information and belief, at least some of defendants have been improperly served with process, or with insufficient process.

TENTH AFFIRMATIVE DEFENSE

27. Plaintiffs lack adequate standing to request at least some of the relief requested in their complaint.

ELEVENTH AFFIRMATIVE DEFENSE

28. Plaintiffs cannot demonstrate the required equitable grounds for all of the injunctive relief sought by them in this action, including but not limited to a genuine possibility of irreparable injury and the absence of an adequate remedy at law.

TWELFTH AFFIRMATIVE DEFENSE

29. Upon information and belief, some or all of the actions described in the complaint were justified under the doctrines of duress or necessity.

THIRTEENTH AFFIRMATIVE DEFENSE

30. Injunctive and other equitable relief are not authorized by 42 U.S.C. § 1985, which only provides a remedy in damages.



WHEREFORE, defendants request judgment dismissing the complaint, and awarding them reasonable costs and attorney's fees, along with such other relief as seems just and proper to this Court.

DATED: Buffalo, New York
February 26, 1991

/s/ James J. Duane

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NOTATION

The Third Amended Complaint (dkt. 72) is identical to the Second Amended Complaint except for the address of one plaintiff.

The answer to the Third Amended Complaint (dkt. 96) simply adopts the answer to the Second Amended Complaint.



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PRO-CHOICE NETWORK OF WESTERN NEW YORK; BUFFALO GYN WOMENSERVICES, P.C.; ERIE MEDICAL CENTER; PAUL J. DAVIS, M.D., P.C.; SHALOM PRESS, M.D.; BARNETT SLEPIAN, M.D.; MORRIS WORTMAN, M.D.; HIGHLAND OBSTETRICAL GROUP; ALEXANDER WOMEN'S GROUP,

Plaintiffs,

v.

DECISION AND ORDER
90-CV-1004A

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO; DELORES GLASER; CARMELINA GOLBA, KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES

HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS; NEAL KOCHIS; PAULETTE LIKOUDIS; CHARGES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

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## INTRODUCTION

Plaintiffs have petitioned for civil contempt claiming that, on November 29, December 1 and December 8, 1990, defendant Nancy Walker violated the provisions of this Court's temporary restraining order ("TRO") dated September 27, 1990. Plaintiffs seek compensatory and coercive civil contempt sanctions to remedy the loss they suffered as a result of the



alleged violations, and to coerce Walker into conforming her behavior to the terms of the TRO in the future. An evidentiary hearing on plaintiffs' petitions was held over the course of several days from February 6, 1991 to February 14, 1991. The parties were then given an opportunity to brief and argue their respective positions.

After considering the evidence adduced at the hearing, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' petition for civil contempt with regard to the violations that occurred on November 29 and December 1, 1990. With regard to the violations alleged to have occurred on December 8, 1990, the Court denies plaintiffs' petition. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

## BACKGROUND

Plaintiffs Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. It is dedicated to maintaining legal and safe access to family planning and abortion services in the Western New York area. It also provides individuals to serve as escorts for patients seeking access to the plaintiff health care providers' facilities.

Defendants in the main action include three organizations, Project Rescue Western New York, Operation

Rescue and Project Life of Rochester, and 50 individuals, including Nancy Walker. They are opposed to abortion and dedicated to the "pro-life" movement. Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of their patients and staff.

Plaintiffs commenced the main action on September 24, 1990. Immediately upon filing their complaint, plaintiffs moved for a TRO, pursuant to Fed. R. Civ. P. 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the "blockade" was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard argument on the TRO motion. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the complaint and supporting affidavits, the Court, following New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990), issued a TRO (a copy of which is attached hereto as an appendix to the Decision and Order) enjoining defendants from conducting any blockade of plaintiffs' abortion facilities and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a full-fledged blockade, on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1991 hearing, plaintiffs established service on nearly all defendants, including Nancy Walker, and James Duane, Esq. appeared on behalf of defendants. Defendants then moved to



either dismiss or stay the action pursuant to the abstention doctrine. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion to dismiss or stay the case. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided.[1]

On December 6, 1990, plaintiffs filed a petition for contempt against defendant Nancy Walker, alleging that she violated the TRO on November 29 and December 1. On December 14, 1990, plaintiffs filed another petition for contempt against Walker alleging that she violated the TRO on December 8, 1990. As stated earlier, a hearing was held over the course of several days from February 6, 1991 to February 14, 1991. Plaintiffs called as witnesses Lisa Baker, Ruth Harvey, Paul J. Davis, Elizabeth Sholes, Linda Orlowski, Christine Smith, Marilyn Buckham, Cathleen McGuire, Deborah Warnes and Antoinette Schruefer. Walker called as witnesses Mary Anne Romanowski, Bonnie Behn, Vicky Olczak, Michael Prestia and Sandra Jerge. Walker also testified. Following the hearing, the parties were given the opportunity to brief and argue their respective positions.

## FINDINGS OF FACT

### I. November 29, 1990

During the morning of November 29, 1990, Nancy Walker was located outside of the health care facility of plaintiff Paul Davis, M.D. at 1404 Millersport Highway, Amherst, New

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[1] The motion for a preliminary injunction was granted on February 14, 1992.

York. She was there as part of a "rescue" demonstration offering "sidewalk counseling" to women entering the clinic. Abortions are performed at Dr. Davis' clinic and it was Walker's intention to dissuade women entering the clinic from having abortions.

At about 9:50 a.m., Lisa Baker and two unidentified friends, one of whom had an appointment with Dr. Davis, drove their automobile into the parking lot of the plaza in which Dr. Davis' clinic is located. As soon as they parked their vehicle, they were approached by Walker along with one other "sidewalk counselor" and a woman holding a video camera. Walker and her cohorts crowded around the vehicle and made it difficult for Baker and her companions to exit therefrom. They also started to communicate with the occupants of the vehicle in a loud and threatening manner. Even after Baker and her companions managed to exit the vehicle, Walker, her fellow "sidewalk counselor," and the cameraperson continued to crowd them and invade their personal space. As Baker and the other two women tried to make their way toward the clinic, Walker followed them closely and continued to deliver her message in a loud and threatening manner. She kept telling them that "abortion is murder, you'll go to hell, we can help you, don't go in there." Walker also attempted to force literature into the hands of Baker and her friends. As Baker and her companions continued toward the clinic, Walker became frustrated and began to yell at them.

Confronted with Walker's loud and invasive behavior, Baker and her friends repeatedly asked Walker to leave them alone. None of the three women showed any interest in Walker's message and kept trying to walk away. Their efforts, however, were futile. Walker ignored the requests and continued to follow, crowd and yell at the three women. Walker's conduct impeded and hindered Baker and her companions' access to the clinic. A walk through the parking lot that normally would have taken



one minute took several minutes. Baker testified that Walker's conduct made her feel scared, angry and upset–like she was "in the middle of a lynch mob." Walker continued to pursue the women all the way up to the sidewalk abutting the front entrance of Dr. Davis' clinic. At that point Walker was approximately four feet away from the entrance of the clinic. She continued to yell at the women even after they entered the clinic and her voice was loud enough to be heard through the clinic doors.

Baker testified that the encounter was particularly distressing due to the presence of the video camera. As Baker and her companions drove into the parking lot, they observed that the woman with the camera, later identified as Bonnie Behn, was videotaping their vehicle and the vehicle's license plate. Further, during the entire encounter between Walker and the three women seeking access to the clinic, Behn kept pointing the video camera into the faces of the women for no other apparent reason than to threaten them with the prospect that their identities may be revealed.

It is undisputed that the plaza complex at 1204 Millersport Highway is private property, with commercial access to tenants and patrons of the plaza. The entire premises, including the parking lot, are clearly marked as private property. The parking lot is surrounded by "Private Property - No Trespassing" signs that were placed there by the owner and there is a sign posted, with the owner's permission, near the entrance to Dr. Davis' clinic that prohibits trespassing, soliciting, demonstrating and pamphleteering anywhere on the premises. By her own admission, on November 29, 1990, Walker went onto the parking lot at 1204 Millersport Highway for the sole purpose of "sidewalk counseling." She was not there to patronize any of the businesses and she did not have the express permission of the owner to enter thereon for any other reason.

In weighing the credibility of the witnesses at the hearing, the Court notes that Lisa Baker, who had absolutely no reason or motive to dissemble, was a wholly credible witness. Her testimony was corroborated by Ruth Harvey, a volunteer patient escort who witnessed the events of that day and, in several aspects, by Walker herself. The testimony of defense witnesses, on the other hand, was so riddled with inconsistencies, both internal to their own testimony and compared to that of other defense witnesses, or so marked by suspiciously selective memory that, for the most part, it is inherently incredible.

II. December 1, 1990

On the morning of December 1, 1990, Nancy Walker was located outside the Buffalo GYN Womenservices' clinic at 1241 Main Street, Buffalo, New York. She was there as part of a "rescue" demonstration offering "sidewalk counseling" to women entering the clinic. Abortions are performed at the Buffalo GYN Womenservices' Clinic and it was Walker's intention to try to dissuade women entering the clinic from having abortions. At approximately 9:05 a.m., an automobile with Pennsylvania license plates stopped at the traffic light located at the intersection of Main and Northhampton Streets. Walker testified that she assumed that at least one of the occupants was going to the clinic for an abortion since the automobile had out-of-state license plates.

Walker approached the vehicle as it waited at the light and began to talk to the occupants through the driver's side window. When the light changed, the vehicle turned right and headed north on Main Street away from the clinic. It then went one block north and pulled over to the curb. Walker pursued the car and as she approached it, two women emerged and started walking down the street toward the clinic. Walker hurried



toward them and started to importune them in a loud and threatening manner. She tried to force literature upon them even though they refused. Walker continued to yell at the women and to follow closely behind them as they made their way toward the clinic. She crowded the women and invaded their personal space. Even when the women asked her to leave them alone, she continued to importune them. Walker pursued the two women for an entire city block. One of the women broke down into tears and started to sob. Walker followed the women all the way up to the clinic entrance.[2]

At the hearing, Walker produced a videotape of certain portions of the December 1, 1990 incident. While the tape was admitted into evidence, the Court has given the tape little weight in its decision. The cameraman, Michael Prestia, selectively taped only those events that he thought important. At critical moments when contemptuous conduct is alleged to have occurred, the camera was either turned off or pointed at the ground. Prestia testified that the reasons for these omissions were because he was blocked by "pro-choice" escorts or because he wanted to save his battery. Had the camera been in the hands of an unbiased third-party, the Court might find these explanations credible. However, in this case, the camera was being operated by Prestia, who is a "pro-life" activist. The Court finds Prestia to be a biased and incredible witness. His testimony was often inconsistent and evasive. Thus, in view of the circumstances, the Court can only conclude that Prestia purposely turned the camera off or pointed it at the ground whenever he felt that it might capture Walker

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[2] Plaintiffs also allege that there was a second incident on December 1, 1990 that involved Walker and two women and a man seeking access to the clinic. However, there was little evidence adduced at the hearing concerning this incident. Thus, the Court has not considered the second incident in its decision.

violating the TRO.

Several patient escorts gave uncontradicted testimony that for the initial few weeks after the TRO was in place, Walker and her cohorts altered their behavior by "sidewalk counseling" in a quiet, nonthreatening manner, and by ceasing their counseling when requested to do so. However, once the immediate threat of sanctions dissipated, Walker went right back to the unlawful conduct that warranted the TRO in the first place, i.e., she "counseled" women seeking entrance to the clinics in a loud and threatening manner and continued to do so even after being asked to cease and desist. This uncontradicted testimony clearly demonstrates that Walker knew how to comply with the TRO but eventually chose not to.

Further evidence of Walker's lack of regard for the Court's TRO is found in defendants' videotape of the December 1, 1990 incident. At one point, Walker is shown screaming into the camera: "I don't care if Arcara puts me in ja . . . ." Suddenly, the camera is shut off. The word cut off is obviously "jail." This footage demonstrates that Walker was aware that she was violating the TRO.

III. December 8, 1990

On the morning of December 8, 1990, Walker was once again engaged in "sidewalk counseling" activities in front of the clinic at 1241 Main Street. At approximately 7:55 a.m., she encountered a young man and woman seeking access to the clinic. She walked up to them and began communicating with them. The man and woman kept walking down the sidewalk toward the clinic entrance. Walker continued to follow the couple and to communicate her message. Walker's tone of voice was much more subdued than during the incidents on November 29 and



December 1, 1990. She was not yelling and did not block or impede the man and woman from entering the clinic. Moreover, it is unclear from the evidence adduced at the hearing whether the couple ever manifested their desire for Walker to leave them alone in such away that Walker could have reasonably been expected to understand and comply with such a request.

As with the December 1, 1990 incident, Walker produced a videotape portraying certain portions of the incident on December 8, 1990. For the same reasons regarding the December 1, 1990 videotape, the Court has given the December 8, 1990 tape little weight in its decision.

## CONCLUSIONS OF LAW

I. Standing

In Terry, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patient's "enjoyment of those rights is `inextricably bound up with the activity the litigant wishes to pursue,'" and thus, the court could be "assured that the clinics represent the rights and interests of the women seeking their assistance." Id. at 1348. The Terry court also held that "pro-choice" organizations had standing as representatives of their membership. Id. at 1349. Thus, plaintiffs have standing to enforce the Court's TRO.

II. Civil Or Criminal Contempt

Walker claims that the requested contempt sanctions are criminal in nature and she must therefore be afforded all the constitutional protections associated with a criminal proceeding

before she can be held in contempt of the Court's TRO. See Hicks v. Feiock, 485 U.S. 624 (1988) ("[C]riminal penalties may not be imposed on someone who has not been afforded the protection that the Constitution requires of such criminal proceedings..."). The Court finds this argument without merit.

An individual who fails to obey a valid court order is subject to both civil and criminal contempt penalties for the same acts. United States v. Petito, 671 F.2d 68, 72 (2d Cir.), cert. denied, 459 U.S. 824 (1982). The general principles distinguishing civil and criminal contempt are well established.

> The two species of contempt are distinguished by determining the purpose for which the sanction [is] imposed. A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil. A sanction imposed to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief, is criminal in nature.

Terry, 886 F.2d at 1350-51 (citations omitted). Thus, civil contempt sanctions serve two purposes: (1) to coerce future compliance with the court's order; and (2) to compensate the complainant for losses stemming from noncompliance. New York State NOW v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) (citations omitted). In many similar cases brought in other federal courts, including the Second Circuit, against anti-abortion protestors, the courts have had the opportunity to discuss the difference between civil and criminal contempt, and have uniformly concluded that contempt sanctions of the type sought here against Walker are civil in nature. New York State NOW v. Terry, No. 90-6187, slip op. at 9198 (2d Cir. Apr. 13, 1992); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990); Portland



Feminist Women's Health Center v. Advocates for Life Inc., 887 F.2d 787 (9th Cir. 1989); Terry, 697 F. Supp. at 1329-30; 886 F.2d at 1350-51.

Walker argues that the instant proceedings necessarily involve imposition of criminal contempt sanctions. The crux of her argument is that because these proceedings are occurring after the conclusion of the conduct complained of, she has no opportunity to cure her contempt and any sanction imposed is therefore punitive in nature.

It is abundantly clear, however, that the present contempt proceedings are civil, rather than criminal, in nature. These contempt proceedings were initiated by plaintiffs, not by the Court or the government. Further, plaintiffs seek only to enforce their rights under the TRO and to remedy the harm caused by Walker's past violations. The proceedings seek the imposition of conditional and coercive fines in amounts clearly specified in the TRO itself. The condition can be avoided by compliance and the coercive nature of the fine derives from its encouragement of future compliance. It is undisputed that Walker was on notice of the TRO and the penalties she would face for noncompliance. Thus, she violated the TRO at her own peril and must be sanctioned in order to coerce her future compliance.

## III. Collateral Attack

Walker, in arguing against the imposition of contempt sanctions, raises several challenges to the propriety of the Court's TRO. She argues that: (1) the "cease and desist" language in the TRO violates her First Amendment right to freedom of speech and is therefore unconstitutional; (2) the "tortious harassment" language is unconstitutionally vague and overbroad; and (3) the TRO is legally invalid because plaintiffs never showed a threat of

irreparable harm. The Court finds, however, that the collateral bar rule precludes Walker from challenging the validity of the underlying TRO as a defense against the imposition of contempt sanctions.

The collateral bar rule is longstanding and its purpose is clear.

> If a party can make himself a judge of the validity of orders that have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). "The orderly and expeditious administration of justice requires that an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" Maness v. Meyers, 419 U.S. 449, 459 (1975) (quoting United States v. United Mine Workers, 330 U.S. 258, 293 (1947)). "A `contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 441 n.21 (1986) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)).

The Supreme Court has applied the collateral bar rule even when the underlying injunction may tread upon important First Amendment rights. In Walker v. City of Birmingham, 388 U.S. 307 (1967), the Court ruled that civil rights protestors, who were charged with contempt for marching in Birmingham without a parade permit in violation of a state court's temporary



injunction, could not litigate the validity of the order in the contempt proceedings. The Court reached this conclusion despite serious reservations about the constitutionality of the underlying order. Id. at 317. The Court explained that:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21.

In the instant case, the Court has jurisdiction over the parties and the subject matter.[3] The Court finds that its TRO is not transparently invalid, but rather was carefully crafted to protect Walker's First Amendment rights. The TRO was in effect for two months prior to Walker's first violation and throughout that entire period neither Walker nor any of the other defendants moved to modify or vacate the TRO. In fact, Walker and the other defendants, through their attorney, consented to the extension of the TRO until the Court decided plaintiffs' motion for a preliminary injunction. Had defendants refused to consent to the extension of the TRO, the Court would have been faced

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[3] The defendants did make a motion to dismiss the case based on the abstention doctrine. However, in a Decision and Order dated October 29, 1990, the Court denied the motion.

with the option of: (1) letting the TRO expire in accordance with Fed. R. Civ. P. 65(b); or (2) immediately converting the TRO into a preliminary injunction thereby making it an appealable order. Thus, Walker had ample opportunity to challenge the validity of the TRO directly before this Court and before the Second Circuit Court of Appeals, rather than through a contempt proceeding. Instead, she chose to consent to an extension of the TRO.

## IV. Civil Contempt Standard

A court can hold a party in civil contempt only when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is "clear and convincing"; and (3) the party has not been reasonably diligent and energetic in attempting to comply with the order. EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 594 (2d Cir. 1991); Terry, 886 F.2d at 1351. It is not necessary for the plaintiff to prove that the defendant willfully disobeyed the order. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Donovan v. Sovereign Sec. Ltd., 726 F.2d 55, 59 (2d Cir. 1984). After applying this standard to the instant case, the Court finds that Walker was in civil contempt of the TRO on November 29 and December 1, 1990, but was not in contempt on December 8, 1990.

### A. The Order is Clear and Unambiguous

Fed. R. Civ. P. 65(d), requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." The Rule was intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See Schmidt v. Lessard, 414 U.S. 473 (1974). To comply with the specificity and clarity requirements of Rule



65, an injunction must be specific and definite enough to give a person of ordinary intelligence fair notice of what conduct is prohibited. Terry, 886 F.2d at 1352 (citing In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985)); cf. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Court finds that the conduct that lay between that which was prohibited and that which was permitted under the proscriptions of the TRO was sufficiently clear for Walker to ascertain precisely what she could and could not do. Thus, the TRO is sufficient to serve as a foundation for a contempt citation.

### B. Proof of Noncompliance

Civil contempt petitions require proof by "clear and convincing evidence." Terry, 886 F.2d at 1352; Securities & Exch. Comm'n v. American Bd. of Trade, 830 F.2d 431 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988). "Clear and convincing evidence" is an intermediate standard of proof that is beyond a "preponderance of the evidence" standard, but not as stringent as "beyond a reasonable doubt." Addington v. Texas, 441 U.S. 418, 424 (1978). This standard is appropriate for the protection of "particularly important individual interests" that nevertheless do not implicate the fundamental liberty interests found in criminal cases. Id. The "clear and convincing evidence" standard is met by evidence that produces in the mind of the trier of fact "an abiding conviction that the truth of [the] factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316 (1983).

#### 1. November 29, 1990

Plaintiffs have presented "clear and convincing evidence" that Walker's conduct on November 29, 1990 violated several

provisions of the TRO. First, Walker trespassed on the facility of plaintiff Paul Davis, M.D. at 1404 Millersport Highway, Amherst, New York, for the sole purpose of tortiously harassing three individuals who were seeking access to Dr. Davis' clinic. Second, she proceeded to follow these people throughout the parking lot, harassing them all the while. Third, she refused to cease and desist from such conduct despite being asked to do so at least four or five times. Finally, Walker followed the women right up to the curb of the sidewalk adjacent to the front entrance of the clinic well within the fifteen feet "clear zone" provided in the TRO. Accordingly, the Court finds that Walker violated the TRO on November 29, 1990.

2. December 1, 1990

Here again there is "clear and convincing evidence" that Walker violated the TRO. On December 1, 1990, Walker approached two women who were seeking access to the Buffalo GYN Womenservices' clinic at 1241 Main Street, Buffalo, New York. She pursued these two women for an entire city block, harassing them all the while. She yelled at them, crowded them, invaded their personal space, and impeded and hindered them from entering the clinic. Further, she failed to cease and desist from this conduct despite repeatedly being asked to do so by the two women. Walker followed the women all the way up to the clinic entrance, and continued to yell at them even after they entered therein. Accordingly, the Court finds that plaintiffs have established by "clear and convincing evidence" that Walker violated the TRO on December 1, 1990.

3. December 8, 1990

With regard to the last incident on December 8, 1990, the Court finds that plaintiffs have failed to meet their burden of



proving Walker's noncompliance by "clear and convincing evidence." Walker's conduct was much more subdued on that occasion than it was on November 29 and December 1, 1990. She did not yell at the two people seeking access to the clinic nor did she crowd or hinder them in any way. Plaintiffs allege that Walker failed to cease and desist from communicating her message to the two people despite their request that she do so. It is not clear, however, whether the people manifested their desire to be left alone in such a way that Walker could have reasonably been expected to understand and comply with that desire. While it is not necessary under the TRO for people entering plaintiffs' clinics to express verbally their desire to be left alone, there must be some manifestation of that desire before defendants are required to cease and desist from communicating their message. Here, plaintiffs have failed to establish by "clear and convincing evidence" that the two people entering the clinic on December 8, 1990, manifested their desire to be left alone.[4]

C. Reasonable Diligence

The Court finds that Walker was not reasonably diligent and energetic in attempting to achieve compliance with the TRO. Several patient escorts gave uncontradicted testimony that for the initial few weeks after the TRO was in place, Walker and her associates altered their behavior by "sidewalk counseling" in a quiet, nonthreatening manner, and by ceasing their counseling when requested to do so. However, once the immediate threat of sanctions dissipated, Walker went right back to the unlawful conduct that warranted the TRO in the first place. This

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[4] With regard to this incident, plaintiffs might well have established Walker's noncompliance by a "preponderance of the evidence." However, they have failed to meet the more stringent standard of "clear and convincing evidence."

uncontradicted testimony clearly demonstrates that Walker knew how to comply with the TRO but eventually chose not to.

As stated earlier, further evidence of Walker's lack of regard for the Court's TRO is found in defendants' videotape of the December 1, 1990 incident. At one point, Walker is shown screaming into the camera: "I don't care if Arcara puts me in ja . . . ." Suddenly, the camera is shut off. The word cut off is obviously "jail." This footage demonstrates that Walker was aware that she was violating the TRO. While it is clear that Walker was frustrated by the proscriptions contained in the TRO, her frustration does not excuse her conduct.

V. Amount and Disposition of Sanctions

When imposing civil contempt sanctions for the purpose of coercing compliance with a court order, a court should consider: (1) the character and magnitude of the harm threatened by continued contempt; (2) the probable effectiveness of the proposed sanctions; and (3) the financial consequences of the sanction on the contemnor and the consequent seriousness of the burden of the sanction upon him. Terry, 697 F. Supp. at 1332-33; 886 F.2d at 1353. "The ultimate consideration is whether the coercive sanction–here, a fine–is reasonable in relation to the facts." Terry, 886 F.2d at 1353 (citations omitted).

The TRO provides that failure to comply will subject the contemnor to civil damages of $10,000 per day for the first violation. The TRO further provides that for successive violations, the contemnor will be subject to a civil contempt fine double that of the previous fines. Thus, in this case, Walker faces a total sanction of $30,000–$10,000 damages for the violation on November 29, 1990 and a $20,000 fine for the violation on December 1, 1990.



The Court finds that the character and magnitude of the harm threatened by Walker's continued contumacy is such that a substantial sanction is appropriate. Walker's continued harassment of women seeking medical services at plaintiffs' clinics could cause them to delay or forego obtaining health care thereby increasing the medical risks associated with such care. Further, Walker's persistence in violating the TRO may be emulated by other defendants and "pro-life" activists unless she is sanctioned for her unlawful conduct.

However, while a substantial sanction is appropriate, the Court must also take into account the financial burden to Walker when determining the amount of the sanction. Walker established at the hearing that she has limited financial resources. Thus, the Court will impose an "immediate" sanction of $10,000 and will make payment of the remaining $20,000 contingent on future violations of the Preliminary Injunction.

The $10,000 shall be paid to plaintiffs and divided evenly between Dr. Davis and Buffalo GYN Womenservices. These plaintiff health care facilities have made an uncontested showing of cognizable injuries to their operations resulting directly from Walker's unlawful conduct.

They have shown both actual injury, in the form of disrupted daily operations, patients rendered upset and distressed and increased stress to their staffs, and compensable loss, consisting of the cost of extra security measures and additional staff. Given this showing of actual injury and compensable loss, the Court finds that it is appropriate to award $10,000 to the two plaintiff health care clinics that were the target of Walker's unlawful conduct. See New York v. Shore Realty Corp., 763 F.2d 49, 54 (2d Cir. 1985); Vuitton v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979).

In addition to the contempt sanction, plaintiffs also seek all costs and attorneys' fees associated with enforcing the Court's TRO. The TRO clearly states that a contemnor is liable "for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order." In addition, it is well established that a successful complainant in a contempt proceeding is entitled to the reasonable costs of prosecuting the contempt, including attorneys' fees, if the violation of the court's order is found to have been wilful. Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 39 (2d Cir.1989); Vuitton, 592 F.2d at 130.

In this case, the Court finds that Walker's violation of the TRO was wilful. Even though the TRO clearly and unambiguously spelled out the prohibited activity, Walker continued to trespass on private property, harass patients and staff and impede access to the clinics. Evidence of Walker's wilfulness is found in the videotape of the December 1, 1990 incident. As stated earlier, at one point in the videotape, Walker is shown screaming into the camera: "I don't care if Arcara puts me in ja . . . ." This footage clearly demonstrates that Walker was aware that she was violating the TRO. Thus, because Walker's violations of the TRO on November 29 and December 1, 1990 were wilful, the plaintiffs are entitled to all reasonable costs associated with enforcing the TRO, including attorneys' fees.[5]

## CONCLUSION

For the reasons stated, the Court grants the plaintiffs'

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[5] Plaintiffs are not entitled to costs and attorneys' fees for the December 8, 1990 incident since they failed to prove there was a violation on that date.



petitions for civil contempt against Nancy Walker with regard to the violations occurring on November 29 and December 1, 1990. As a sanction for these violations, the Court imposes $10,000 civil damages and a $20,000 fine for a total of $30,000. The Clerk of the Court shall immediately enter judgment against Walker in the amount of $10,000. These funds are to be paid to plaintiffs Paul Davis, M.D. and Buffalo GYN Womenservices in accordance with this Decision and Order. Payment of the remaining $20,000 is contingent on any future violations of the Preliminary Injunction. In addition, the Court grants plaintiffs' request for reasonable attorneys' fees and costs with regard to the violations occurring on November 29 and December 1, 1990. Plaintiffs shall file an affidavit of all attorneys' fees and costs by August 14, 1992. Walker shall have until August 31, 1992 to respond. Finally, the Court denies the plaintiffs' petition for civil contempt with regard to the violations alleged to have occurred on December 8, 1990.

It is so ordered.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: July 24, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PRO-CHOICE NETWORK OF WESTERN NEW YORK; BUFFALO GYN WOMENSERVICES, P.C.; ERIE MEDICAL CENTER; PAUL J. DAVIS, M.D., P.C.; SHALOM PRESS, M.D.; BARNETT SLEPIAN, M.D.; MORRIS WORTMAN, M.D.; HIGHLAND OBSTETRICAL GROUP; ALEXANDER WOMEN'S GROUP,

Plaintiffs,

v.

DECISION AND ORDER 90-CV-1004A

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO; DELORES GLASER; CARMELINA GOLBA, KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS;



NEAL KOCHIS; PAULETTE LIKOUDIS; CHARGES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

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## INTRODUCTION

Plaintiffs have petitioned for civil contempt claiming that, on October 20, 1990, defendants Bonnie Behn and Carla Rainero violated the provisions of this Court's temporary restraining order ("TRO") dated September 27, 1990. Plaintiffs seek compensatory and coercive civil contempt sanctions to remedy the loss they suffered as a result of the alleged violations, and to coerce defendants Behn and Rainero into conforming their behavior to the terms of the TRO in the future. An evidentiary

hearing on plaintiffs' petition was held over the course of several days from June 18, 1991 to July 12, 1991. The parties were then given an opportunity to brief and argue their respective positions.

After considering the evidence adduced at the hearing, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' petition for civil contempt. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

## BACKGROUND

Plaintiffs Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. It is dedicated to maintaining legal and safe access to family planning and abortion services in the Western New York area. It also provides individuals to serve as escorts for patients seeking access to the plaintiff health care providers' facilities.

Defendants in the main action include three organizations, Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and 50 individuals, including Bonnie Behn and Carla Rainero. They are opposed to abortion and dedicated to the "pro-life" movement. Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of their patients and staff.



Plaintiffs commenced the main action on September 24, 1990. Immediately upon filing their complaint, plaintiffs moved for a TRO, pursuant to Fed. R. Civ. P. 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the blockade was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard argument on the TRO motion. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the complaint and supporting affidavits, the Court, following New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990), issued a TRO (a copy of which is attached hereto as an Appendix) enjoining defendants from conducting any "blockade" of plaintiffs' abortion facilities and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a full-fledged blockade, on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1991 hearing, plaintiffs established service on nearly all defendants, including Bonnie Behn and Carla Rainero, and James Duane, Esq. appeared on behalf of defendants. Defendants then moved to either dismiss or stay the action pursuant to the abstention doctrine. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion to dismiss or stay the case. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction

was decided.[1]

On October 22, 1990, plaintiffs filed a petition for contempt against defendants Bonnie Behn and Carla Rainero alleging that they violated the TRO on October 20, 1990. As stated earlier, an evidentiary hearing on plaintiffs' petition was held over the course of several days from June 18, 1991 to July 21, 1991. Plaintiffs called as witnesses Deborah Warnes, Cathleen McGuire, Marilynn Buckham and Lauren Zorfas. Defendants called as witnesses Thomas Troy, Barbara Toth and Richard Krolewicz. Behn and Rainero also testified. Following the hearing, the parties were given an opportunity to brief and argue their respective positions.

## FINDINGS OF FACT

During the morning of October 20, 1990, Bonnie Behn and Carla Rainero were located in the vicinity of the Buffalo GYN Womenservices clinic at 1241 Main Street, Buffalo, New York. Abortions are performed at the Buffalo GYN Womenservices clinic and it was the intention of Behn and Rainero to dissuade women entering the clinic from obtaining abortions by offering them "sidewalk counseling."

At about 8:25 a.m., Behn and Rainero were standing on the northeast corner of the intersection of Main and Northampton Streets when an automobile heading west on Northampton Street slowly approached the intersection. The vehicle contained two young men and a young woman who were apparently searching for the Buffalo GYN Womenservices clinic.

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[1] The Court granted the motion for a preliminary injunction in a Decision and Order dated February 14, 1992.



The vehicle stopped at the intersection at which time Behn and Rainero approached the vehicle and tried to give the occupants literature.

The vehicle then turned right and headed north on Main Street. It proceeded up Main Street for one block and turned left onto Bryant Street. Behn and Rainero walked north along the east side of Main Street in pursuit of the vehicle and its occupants. Upon reaching the intersection of Bryant and Main, they observed the two young men and the young woman whom they had earlier observed in the vehicle walking east on Bryant toward Main. One of the young men was walking ahead of the others. He arrived at the intersection of Bryant and Main first and approached a pay telephone located on the corner.

Behn and Rainero crossed Main and began talking to the young woman who by that time had arrived at the corner. A short time after Behn and Rainero crossed Main Street, three "pro-choice" escorts, Deborah Warnes, Cathleen McGuire and Lauren Zorfas, who were located in the vicinity of the clinic, crossed Main Street and headed north toward the young woman and her companions in order to offer to escort them to the clinic.

Behn and Rainero initially asked the young woman whether she was seeking an abortion and offered her some literature. The woman responded that she was seeking an abortion but she refused to accept any literature. Behn and Rainero then told her of alternatives to having an abortion, such as adoption or keeping the child. They also offered her assistance and a place to stay if she decided to have the child. The young woman refused all offers of assistance.

Approximately two minutes after Behn and Rainero began talking to the young woman, the three "pro-choice" escorts

arrived at the corner and told the young woman and her companions that they were from the clinic. Upon hearing this, one of the young men stated, "Thank God." The escorts then offered to escort the young woman and her companions to the clinic. The young woman accepted the offer and began walking south on Main Street toward the clinic with the escorts. Behn and Rainero walked along side the young woman, her companions and the escorts, and continued talking to the young woman.

At one point, Behn offered to call the young woman's mother and inform her that the young woman was going to have an abortion. Upon hearing this, the young woman became visibly upset and agitated, and responded, "No. The same thing happened to my sister. I can't. I can't do that." Despite this response, Behn continued to ask the young woman whether she wanted Behn to call her mother.

As the young woman attempted to make her way toward the clinic, Behn and Rainero continued to talk to her. The young woman became increasingly upset and began crying, whimpering and shaking. She was particularly upset by Behn's constant offers to call her mother.

Finally, one of the "pro-choice" escorts explained to the young woman that there was a TRO in effect and Behn and Rainero would have to stop talking to her if she asked them to do so. The young woman turned to Behn and Rainero and asked them to leave her alone. Despite Behn and Rainero's testimony to the contrary, it was clear that the young woman was asking both Behn and Rainero to leave her alone.

In response to the request to be left alone, Behn took a step back, said, "Carla," and nodded to Rainero to move forward and continue talking to the young woman "as if it were a tag



team relay." Rainero moved closer to the young woman and began talking to her. One of the "pro-choice" escorts told Rainero that the young woman had already asked to be left alone. Rainero responded that, "She didn't say it to me." The "pro-choice" escort suggested to the young woman that she again ask Rainero to leave her alone. The young woman then turned to Rainero and asked Rainero to leave her alone. Behn and Rainero, however, ignored the young woman's pleas to be left alone and continued to pursue her and communicate their message all the way up to the clinic's Main Street entrance.[2]

At some point during this incident, two male "pro-life" demonstrators who were on the east side of Main Street crossed the street and began to follow the young woman, her companions, the "pro-choice" escorts, Behn and Rainero down Main Street toward the clinic. One of these men, Richard Krolewicz, was carrying a video camera and appeared to be videotaping the incident.

At the hearing, defendants produced Krolewicz's videotape. While the videotape was admitted into evidence, the Court has given it little consideration in its decision as there is a significant gap in the middle of the tape. The tape begins by showing the "pro-choice" escorts crossing Main Street as they headed toward the young woman and her companions on the corner of Bryant and Main. However, the tape then jumps ahead approximately five minutes and shows the young woman, her companions, the "pro-choice" escorts, Behn and Rainero heading

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[2] Plaintiffs also allege that there was a second incident involving Behn that occurred at about 11:10 a.m. on October 20, 1990. However, there was little evidence adduced at the hearing concerning the second incident. Thus, the Court has not considered this incident in its decision.

south on Main Street back toward the clinic. Thus, the crucial portion of the incident when Behn and Rainero were alleged to have violated the TRO is not included on the tape. Accordingly, the Court finds that the videotape is not a fair and accurate representation of the pertinent facts and will rely instead on the testimony adduced at trial.

## CONCLUSIONS OF LAW

### I. Standing

In Terry, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patient's "enjoyment of those rights is `inextricably bound up with the activity the litigant wishes to pursue,'" and thus, the court could be "assured that the clinics represent the rights and interests of the women seeking their assistance." Id. at 1348. The Terry court also held that "pro-choice" organizations had standing as representatives of their membership. Id. at 1349. Thus, plaintiffs have standing to enforce the Court's TRO.

### II. Civil Or Criminal Contempt

Defendants claim that the requested contempt sanctions are criminal in nature and they must therefore be afforded all the constitutional protections associated with a criminal proceeding before they can be held in contempt of the Court's TRO. See Hicks v. Feiock, 485 U.S. 624 (1988) ("[C]riminal penalties may not be imposed on someone who has not been afforded the protection that the Constitution requires of such criminal proceedings . . . ."). The Court disagrees.



An individual who fails to obey a valid court order is subject to both civil and criminal contempt penalties for the same acts. United States v. Petito, 671 F.2d 68, 72 (2d Cir.), cert. denied, 459 U.S. 824 (1982). The general principles distinguishing civil and criminal contempt are well established.

> The two species of contempt are distinguished by determining the purpose for which the sanction [is] imposed. A sanction imposed to compel obedience to a lawful court order or to provide compensation to a complaining party is civil. A sanction imposed to punish for an offense against the public and to vindicate the authority of the court, that is, not to provide private benefits or relief, is criminal in nature.

Terry, 886 F.2d at 1350-51 (citations omitted). Thus, civil contempt sanctions serve two purposes: (1) to coerce future compliance with the court's order; and (2) to compensate the complainant for losses stemming from noncompliance. New York State NOW v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988) (citations omitted). In many similar cases brought in other federal courts, including the Second Circuit, against anti-abortion protestors, the courts have had the opportunity to discuss the difference between civil and criminal contempt, and have uniformly concluded that contempt sanctions of the type sought here against Behn and Rainero are civil in nature. New York State NOW v. Terry, No. 90-6187, slip op. at 9198 (2d Cir. Apr. 13, 1992); Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990); Portland Feminist Women's Health Center v. Advocates for Life Inc., 887 F.2d 787 (9th Cir. 1989); Terry, 697 F. Supp. at 1329-30; 886 F.2d at 1350-51.

Behn and Rainero argue that the instant proceedings necessarily involve the imposition of criminal contempt

sanctions. The crux of their argument is that because these proceedings are occurring after the conclusion of the conduct complained of, they have no opportunity to cure their contempt and any sanction imposed is therefore punitive in nature.

It is abundantly clear, however, that the present contempt proceedings are civil, rather than criminal, in nature. These contempt proceedings were initiated by plaintiffs, not by the Court or the government. Further, plaintiffs seek only to enforce their rights under the TRO and to remedy the harm caused by defendants' past violations. The proceedings seek the imposition of conditional and coercive fines in amounts clearly specified in the TRO itself. The condition can be avoided by compliance and the coercive nature of the fine derives from its encouragement of future compliance. It is undisputed that Behn and Rainero were on notice of the TRO and the penalties they would face for noncompliance. Thus, they violated the TRO at their own peril and must be sanctioned in order to coerce their future compliance.

## III. Collateral Attack

Behn and Rainero, in arguing against the imposition of contempt sanctions, raise several challenges to the propriety of the Court's TRO. They argue that: (1) the "cease and desist" language in the TRO violates their First Amendment right to freedom of speech and is therefore unconstitutional; (2) the "tortious harassment" language is unconstitutionally vague and overbroad; and (3) the TRO is legally invalid because plaintiffs never showed a threat of irreparable harm. The Court finds, however, that the collateral bar rule precludes Behn and Rainero from challenging the validity of the underlying TRO as a defense against the imposition of contempt sanctions.



The collateral bar rule is longstanding and its purpose is clear.

> If a party can make himself a judge of the validity of orders that have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). "The orderly and expeditious administration of justice requires that `an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" Maness v. Meyers, 419 U.S. 449, 459 (1975) (quoting United States v. United Mine Workers, 330 U.S. 258, 293 (1947)). "A `contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 441 n.21 (1986) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)).

The Supreme Court has applied the collateral bar rule even when the underlying injunction may tread upon important First Amendment rights. In Walker v. City of Birmingham, 388 U.S. 307 (1967), the Court ruled that civil rights protestors, who were charged with contempt for marching in Birmingham without a parade permit in violation of a state court's temporary injunction, could not litigate the validity of the order in the contempt proceedings. The Court reached this conclusion despite serious reservations about the constitutionality of the underlying order. Id. at 317. The Court explained that:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21.

In the instant case, the Court has jurisdiction over the parties and the subject matter.[3] The Court finds that its TRO is not transparently invalid, but rather was carefully crafted to protect defendants' First Amendment rights. The TRO was in effect for almost one month before the alleged violations and throughout that entire period neither Behn, Rainero nor any of the other defendants moved to modify or vacate the TRO. In fact, Behn, Rainero and the other defendants, through their attorney, consented to the extension of the TRO until the Court decided plaintiffs' motion for a preliminary injunction. Had defendants refused to consent to the extension of the TRO, the Court would have been faced with the option of: (1) letting the TRO expire in accordance with Fed. R. Civ. P. 65(b); or (2) immediately converting the TRO into a preliminary injunction thereby making it an appealable order. Thus, Behn and Rainero had ample opportunity to challenge the validity of the TRO

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[3] The defendants did make a motion to dismiss the case based on the abstention doctrine. However, in a Decision and Order dated October 29, 1990, the Court denied the motion.



directly before this Court and before the Second Circuit Court of Appeals, rather than through a contempt proceeding. Instead, they chose to consent to an extension of the TRO.

## IV. Civil Contempt Standard

A court can hold a party in civil contempt only when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is "clear and convincing"; and (3) the party has not been reasonably diligent and energetic in attempting to comply with the order. EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 594 (2d Cir. 1991); Terry, 886 F.2d at 1351. It is not necessary for the plaintiff to prove that the defendant willfully disobeyed the order. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Donovan v. Sovereign Sec. Co., 726 F.2d 55, 59 (2d Cir. 1984). After applying this standard to the instant case, the Court finds that both Behn and Rainero were in civil contempt of the TRO on October 20, 1990.

### A. The Order is Clear and Unambiguous

Fed. R. Civ. P. 65(d), requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." The Rule was intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See Schmidt v. Lessard, 414 U.S. 473 (1974). To comply with the specificity and clarity requirements of Rule 65, an injunction must be specific and definite enough to give a person of ordinary intelligence fair notice of what conduct is prohibited. Terry, 886 F.2d at 1352 (citing In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985)); cf. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Court finds that the conduct that lay between that which was prohibited and that which was permitted by the proscriptives of the TRO was sufficiently clear for defendants to ascertain precisely what they could and could not do. Thus, the TRO is sufficient to serve as a foundation for a contempt citation.

B. Proof of Noncompliance

Civil contempt petitions require proof by "clear and convincing evidence." Terry, 886 F.2d at 1352; Securities & Exch. Comm'n v. American Bd. of Trade, 830 F.2d 431 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988). "Clear and convincing evidence" is an intermediate standard of proof that is beyond a "preponderance of the evidence" standard, but not as stringent as "beyond a reasonable doubt." Addington v. Texas, 441 U.S. 418, 424 (1978). This standard is appropriate for the protection of "particularly important individual interests" that nevertheless do not implicate the fundamental liberty interests found in criminal cases. Id. The "clear and convincing evidence" standard is met by evidence that produces in the mind of the trier of fact "an abiding conviction that the truth of [the] factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316 (1983). After applying the "clear and convincing evidence" standard to this case, the Court finds that plaintiffs have met their burden of proving Behn and Rainero's noncompliance with the TRO on October 20, 1990.

The evidence adduced at trial clearly showed that Behn and Rainero violated ¶ 1(b) of the TRO. Paragraph 1(b) states in pertinent part that:

> [N]o one is required to accept or listen to sidewalk counseling and . . . if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.



The young woman expressly requested Behn and Rainero to leave her alone twice during the incident on October 20, 1990. However, Behn and Rainero ignored the young woman's manifested desire to be left alone and continued to counsel her. This conduct violates the "cease and desist" provision of the ¶ 1(b).

C. Reasonable Diligence

The Court finds that Behn and Rainero were not reasonably diligent and energetic in attempting to achieve compliance with the TRO. Instead, they attempted to circumvent the "cease and desist" provision of the TRO by using a "relay" system, i.e., once the targeted person rejects the counseling of a particular "sidewalk counselor," another one steps forward and continues counseling. This "relay" system obviously violates the spirit, if not the letter, of the "cease and desist" provision. Once the targeted person or group of persons rejects counseling, that rejection is applicable to all "sidewalk counselors." It is not incumbent upon the target of the counseling to say "no" to each and every "sidewalk counselor" who might be present.

V. Amount and Disposition of the Fines

When imposing civil contempt sanctions for the purpose of coercing compliance with a court order, a court should consider: (1) the character and magnitude of the harm threatened

by continued contempt; (2) the probable effectiveness of the proposed sanctions; and (3) the financial consequences of the sanction on the contemnor and the consequent seriousness of the burden of the sanction upon him or her. Terry, 697 F. Supp. at 1332-33; 886 F.2d at 1353. "The ultimate consideration is whether the coercive sanction–here, a fine–is reasonable in relation to the facts." Terry, 886 F.2d at 1353 (citations omitted).

The TRO provides that failure to comply will subject the contemnor to civil damages of $10,000 per day for the first violation. The TRO further provides that for successive violations, the contemnor will be subject to a civil contempt fine double that of the previous fines.

The Court finds that the character and magnitude of the harm threatened by Behn and Rainero's continued contumacy is such that a substantial sanction is appropriate. Unless they are sanctioned, Behn and Rainero's conduct may be emulated by other defendants and "pro-life" activists. Further, neither Behn nor Rainero have made a showing that they would be unduly burdened by a substantial sanction.

Accordingly, the Court will order Behn and Rainero to each pay $10,000 in damages to plaintiff Buffalo GYN Womenservices. Buffalo GYN Womenservices has made an uncontested showing of both actual injury, in the form of disrupted daily operations and patients rendered upset and distressed, and compensable loss, consisting of the cost of extra security measures and additional staff. Given this showing of actual injury and compensable loss, the Court finds that it is appropriate to award damages to Buffalo GYN Womenservices for Behn and Rainero's unlawful conduct. See New York v. Shore Realty Corp., 763 F.2d 49, 54 (2d Cir. 1985); Vuitton v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979).



In addition to the contempt sanction, plaintiffs also seek all costs and attorneys' fees associated with enforcing the Court's TRO. The TRO provides that a contemnor is liable "for all attorneys' fees and related costs incurred by plaintiffs in relation to the enforcement of this Order." In addition, it is well established that a successful complainant in a contempt proceeding is entitled to the reasonable costs of prosecuting the contempt, including attorneys' fees, if the violation of the court's order is found to have been wilful. Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 39 (2d Cir. 1989); Vuitton, 592 F.2d at 130.

In this case, the TRO clearly put Behn and Rainero on notice that they could be held liable for attorneys' fees and costs associated with enforcement of the Order. Thus, plaintiffs are entitled to attorneys' fees and related costs. Further, the Court finds that Behn and Rainero's violation of the TRO was wilful. Even though the TRO clearly and unambiguously spelled out the prohibited activity, Behn and Rainero refused to "cease and desist" from counseling the young woman after being asked twice to do so. These actions clearly manifested Behn and Rainero's intention to violate the Order.

## CONCLUSION

For the reasons stated, the Court grants plaintiffs' petition for civil contempt against both Behn and Rainero. The Clerk of Court shall immediately enter judgments against both Behn and Rainero in the amount of $10,000 each. In addition, the Court grants plaintiffs' request for reasonable attorneys' fees and costs associated with prosecuting the contempt. Plaintiffs shall file an affidavit of attorneys' fees and costs by September 18, 1992. Behn and Rainero shall have until October 16, 1992 to respond.

It is so ordered.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: August 14, 1992



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PRO-CHOICE NETWORK OF WESTERN NEW YORK; BUFFALO GYN WOMENSERVICES, P.C.; ERIE MEDICAL CENTER; PAUL J. DAVIS, M.D., P.C.; SHALOM PRESS, M.D.; BARNETT SLEPIAN, M.D.; MORRIS WORTMAN, M.D.; HIGHLAND OBSTETRICAL GROUP; ALEXANDER WOMEN'S GROUP,

Plaintiffs,

THE CHILDREN'S HOSPITAL OF BUFFALO,

Intervenor-Plaintiff,

v.

DECISION AND ORDER
90-CV-1004A

PROJECT RESCUE WESTERN NEW YORK; OPERATION RESCUE; PROJECT LIFE OF ROCHESTER; REV. PAUL SCHENCK; REV. JAMES L. EVANS; REV. TED CADWALLADER; DWIGHT SAUNDERS; DAVID ANDERSON; JEFFREY BARAN; BRIAN BAYLEY; BONNIE BEHN; RONALD BREYMEIER; GILBERT CERTO; SCOTT CHADSEY; KIM DAY; CONSTANCE DEBO; MARK DENT; WAYNE DENT; PAUL DIEMERT; JOAN GIANGRECO;

DELORES GLASER; CARMELINA GOLBA, KEVIN GOLBA; LINDA HALL; NANCY HALL; THOMAS HALL; REV. DANIEL HAMLIN; JAMES HANDYSIDE; PAMELA HUFFNAGLE; DONNA JOHANNS; ERIC JOHNS; NEAL KOCHIS; PAULETTE LIKOUDIS; CHARGES MCGUIRE; CHRISTOPHER MORROW; ANNEMARIE NICE; NICHOLAS PUKALO; CARLA RAINERO; THOMAS RILEY; PATRICIA OSTRANDER; LINDA ROSS; DAVID SMITH; LINDA SMITH; MARK STERLACE; JOYCE STRIGEL; JOHN THOMANN; JOHN TOMASELLO; PAUL WALDMILLER, JR; NANCY WALKER; LEONARD WINTER; HORACE WOLCOTT; GERALD CRAWFORD; DAVID LONG; JOHN DOE(S) AND JANE DOE(S), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein.

Defendants.

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## INTRODUCTION

Plaintiffs have petitioned for civil contempt claiming that, on December 29 1990, Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue Western New York ("Project Rescue") violated the provisions of this Court's temporary restraining order ("TRO") dated September 27, 1990. Plaintiffs seek compensatory and coercive civil sanctions to remedy the loss they suffered as a result of the alleged violations, and to coerce defendants into conforming their behavior to the terms of the TRO in the future. An evidentiary hearing on plaintiffs' petition was held over the course of several days from October 15, 1991 to January 30, 1992.



After considering the evidence adduced at the hearing, reviewing the submissions of the parties, and hearing argument from counsel, the Court grants plaintiffs' petition for civil contempt. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

## BACKGROUND

Plaintiffs Buffalo GYN Womenservices, Erie Medical Center, Paul Davis M.D., Shalom Press M.D., Barnett Slepian M.D., Highland Obstetrical Group, and Alexander Women's Group are health care providers located in the Western New York area. They offer family planning services, abortion services and gynecological services at their health care facilities. Plaintiff Pro-Choice Network of Western New York is a not-for-profit corporation based in Buffalo, New York. It is dedicated to maintaining legal and safe access to family planning and abortion services in the Western New York area. It also provides individuals to serve as escorts for patients seeking access to the plaintiff health care providers' facilities.

Defendants in the main action include three organizations, Project Rescue, Operation Rescue and Project Life of Rochester, and fifty individuals, including Rev. Paul Schenck. They are opposed to abortion and dedicated to the "pro-life"

movement. Plaintiffs allege that defendants have been engaged in a consistent pattern of illegal conduct at plaintiffs' health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of their patients and staff.

Plaintiffs commenced the main action on September 24, 1990. Immediately upon filing their complaint, plaintiffs moved for a TRO, pursuant to Fed. R. Civ. P. 65(b), to enjoin a "blockade" that defendants had announced for September 28, 1990. The location of the blockade was to be kept secret until the morning it was scheduled to occur. On September 26, 1990, the Court conducted a hearing and heard argument on the TRO motion. On September 27, 1990, after hearing further argument from plaintiffs' counsel and some of the named defendants, and after reviewing the complaint and supporting affidavits, the Court, following New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990), issued a TRO (a copy of which is attached hereto as an Appendix) enjoining defendants from conducting any blockade of plaintiffs' abortion facilities and from harassing patients and staff entering or exiting the facilities.

Defendants complied with the TRO by holding a peaceful demonstration, rather than a full-fledged blockade, on September 28, 1990. The Court then scheduled a hearing for October 4, 1990, in order to determine whether the TRO should be converted into a preliminary injunction pursuant to Rule 65. At the October 4, 1991 hearing, plaintiffs established service on nearly all defendants, including Rev. Paul Schenck and Project Rescue, and James Duane, Esq. appeared on behalf of defendants. Defendants then moved to either dismiss or stay the action pursuant to the abstention doctrine. In a Decision and Order dated October 29, 1990, the Court denied defendants' motion to



dismiss or stay the case. In an Order dated November 2, 1990, the Court, with defendants' consent, ordered that the TRO would remain in effect until the motion for a preliminary injunction was decided.[1]

On March 26, 1991, plaintiffs filed a petition for civil contempt against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue alleging that they violated the TRO on December 29, 1990. As stated earlier, an evidentiary hearing on plaintiffs' petition was held over the course of several days. Plaintiffs called as witnesses Marilynn Buckham, Karen Swallow Prior, Elizabeth Sholes, Gerald J. Carriero, David M. Crossland, Deborah Warnes and Jacqueline Albarella. Defendants called as witnesses Mark Smith, Dennis Marriott, Julianna Prestia, Richard Krolewicz and Steven Asposto. Rev. Paul Schenck and Rev. Robert Schenck also testified. Following the hearing, the parties were given an opportunity to brief and argue their respective positions.

## FINDINGS OF FACT

Rev. Paul Schenck and Rev. Robert Schenck are both ordained ministers and are very active in the local "pro-life" movement. Paul Schenck is a named defendant in the main action. Robert Schenck is not.

Project Rescue is an organization dedicated to the "pro-life" movement. It is a named defendant in the main action. As the Court stated in its February 14, 1992 Preliminary Injunction Decision and Order:

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[1] The Court granted the motion for a preliminary injunction in a Decision and Order dated February 14, 1992.

> [A]lthough not organized in corporate or partnership form, Project Rescue produces and distributes literature that encourages participants to gather in front of abortion clinics and block or impede access to them, has official spokespersons and designated leaders who organize and plan its activities, possesses a mailing address, engages in correspondence, has an active telephone "hotline," seeks donations in its name, and reimburses its members for expenses. Thus, Project Rescue possesses adequate characteristics of a legal entity to be enjoined or held in contempt.

Project Rescue regularly sponsors "rescue" demonstrations at abortion clinics throughout the District. These demonstrations are intended to dissuade women from entering the clinics and to communicate the "pro-life" message to the public. Project Rescue sponsors a "rescue" demonstration almost every Saturday morning at plaintiff Buffalo GYN Womenservices' clinic located at 1241 Main Street, Buffalo, New York.

On the morning of December 29, 1990, Project Rescue sponsored one of its regular Saturday morning "rescue" demonstrations at 1241 Main Street. Several people who have previously testified in this case that they are regular Project Rescue participants–Nancy Walker, Bonnie Behn and Michael Prestia–were present at this demonstration and engaged in the usual Project Rescue activities such as demonstrating, picketing and "sidewalk counseling." Two other Project Rescue participants, Richard Krolewicz and Mark Smith, videotaped much of what



occurred that morning[2] and their videotapes were admitted into evidence at the hearing.[3]

Also present at 1241 Main Street that morning were Rev. Paul Schenck and Rev. Robert Schenck. Paul Schenck is a leader of Project Rescue. He has led various Project Rescue activities and solicited money by mail and at church services in the name of Project Rescue. Robert Schenck is a participant in Project Rescue.

Although Paul and Robert Schenck are "identical" twins, they do possess distinguishing features that enable others, including this Court, to tell them apart. On the morning of December 29, 1990, they were dressed similarly. They both were wearing dark gray or black long overcoats and gray brimmed hats. However, there were some noticeable differences in their attire. Paul Schenck was wearing light gray slacks while Robert Schenck was wearing darker gray or black slacks. Further, Paul Schenck was wearing a necktie with a polka-dot pattern while Robert Schenck was wearing a tie with a paisley-like pattern. Finally, Paul Schenck was wearing eyeglasses with tortoise shell colored frames while the frames of Robert Schenck's glasses were part metal and part tortoise shell.

At the hearing, the Schencks insisted that they were not

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[2] Krolewicz used a videocamera owned by Project Rescue.

[3] Plaintiffs contend that defendants' videotapes were edited after the fact in order to delete incriminating footage. Both sides presented expert testimony on the issue of whether the tapes were edited. The Court finds the expert testimony inconclusive and will use those portions of the videotape that are corroborated by other credible evidence or otherwise fairly and accurately depict the relevant facts.

present at 1241 Main Street on December 29, 1990 as part of Project Rescue. Rather, they contend that they were there only to evangelize and preach. The Court finds, however, that their testimony in this regard is not credible. Despite their protestations to the contrary, the Schencks did not pick 1241 Main Street at random as a location to evangelize and preach–they obviously were there because the abortion clinic is there. The Schencks had been at that location before and knew that abortions were performed at the clinics. The videotapes offered by the defendants clearly show the Schencks conversing with other Project Rescue participants, walking with them, answering their questions and directing their activities. The videotapes and the testimony adduced at the hearing also establish that, on at least three separate occasions, which will be discussed in more detail later, the Schencks attempted to dissuade women from entering the clinic. Thus, the evidence adduced at the hearing established clearly and convincingly that Paul and Robert Schenck were present at 1241 Main Street on December 29, 1990 as part of Project Rescue and in furtherance of its goals, and that the Schencks were acting in concert with each other, with Project Rescue and with the other Project Rescue participants present that morning.

At approximately 7:54 a.m., an automobile heading north on Main Street pulled over to the curb in front of the Main Street entrance to the clinic.[4] At that moment, the Schencks were located just north of the clinic entrance and were walking south on the sidewalk along Main Street.

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[4] Plaintiffs claim that there was also an earlier violation of the TRO at about 7:45 a.m. that involved Paul Schenck and one of the "pro-choice" escorts, Elizabeth Sholes. The Court has not considered that incident in this decision.



After the automobile pulled over to the curb, a woman in a yellow rain slicker got out of the passenger side of the vehicle and began to walk quickly toward the clinic entrance. The clinic entrance is approximately twenty feet from the curb. Upon seeing the vehicle pull over and the woman exit, Paul and Robert Schenck immediately hurried toward her and began to exhort her not to have an abortion. With raised voices, they told the woman that she should not enter the clinic, she should not have an abortion and she should not kill her baby.

The woman walked quickly into the alcove located at the entrance of the clinic.[5] The Schencks pursued the woman into the alcove and continued to exhort her in a loud manner. The woman then opened the glass door in the alcove and went into the vestibule. At this point, both Schencks were located inside the alcove[6] and were standing shoulder to shoulder. Their presence there effectively blocked the entrance to the clinic. After repeated warnings by "pro-choice" escort Deborah Warnes that they were on private property and should leave immediately, the Schencks exited the alcove.

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[5] The alcove is located on private property that is leased to the clinic. The alcove leads to a glass door which in turn leads into a vestibule. In the vestibule across from the glass door is a solid door with a small window which leads into the clinic. The door is kept locked and is opened electronically from inside the clinic. The floor of the alcove is clearly distinguishable from the public sidewalk that abuts it. The alcove floor is made of light colored tiles while the sidewalk is made of gray concrete. "Pro-choice" escorts often stand in the alcove in order to avoid bad weather. The escorts were blue aprons which have printed on them the words "PRO-CHOICE ESCORT."

[6] At the hearing, both Schencks admitted going into the alcove that morning.

At approximately 8:11 a.m., Paul Schenck was located directly in front of the Main Street entrance to the clinic and was engaged in conversation with a security guard employed by the clinic when a young woman attempted to enter the clinic through the Main Street entrance with the assistance of several "pro-choice" escorts. Schenck turned toward the woman and began to exhort her not to enter. He also offered her some literature. The woman made her way past Schenck, went into the alcove and entered the vestibule through the glass door. Schenck followed the woman into the alcove and continued to exhort her not to have an abortion. After the woman went into the vestibule, Schenck moved close to the closed glass door leading into the vestibule and shouted at the woman through the closed door.

Immediately following the incident at 8:11 a.m., Paul Schenck left the clinic's Main Street entrance, walked around the corner onto Northampton Street and took up a position near the driveway entrance to the parking lot behind 1241 Main Street. Somewhere in his trip between the Main Street entrance and the driveway entrance he met his brother Robert who gave him the red umbrella that Robert had been carrying. Robert then walked around the corner and took up a position in front of the Main Street entrance.

About this time, a light gray Volvo sedan with Pennsylvania license plates turned from Main Street onto Northampton Street heading east. A woman was driving the vehicle and a young woman was in the passenger's seat. The vehicle slowed down as it approached the driveway entrance to the clinic parking lot. David Crossland, who acts as a "pro-choice" escort on a regular basis at 1241 Main Street, testified that, based on the ages of the women and the vehicle's Pennsylvania license plates, he believed the women were looking



for the clinic parking lot. The two women in the vehicle looked directly at the driveway entrance and the Project Rescue participants who were milling around the entrance. The women appeared confused and anxious. They then drove by the driveway entrance, continued down Northampton and disappeared around the corner.

The same vehicle returned to the area of the driveway entrance a few minutes later. This time the vehicle was heading west on Northampton. Again the vehicle slowed down but did not turn into the driveway. Instead, it continued on Northampton and disappeared.

A brief time later, the vehicle again appeared near the driveway entrance heading west on Northampton. This time the driver signaled that she intended to turn left into the driveway. As the vehicle slowed down and began to make the left turn into the driveway, Paul Schenck placed himself directly in front of the vehicle on the driver's side of the hood in order to block the vehicle from entering. His body was very close to the vehicle and eventually was touching it. Schenck exhorted the women in the vehicle not to enter the clinic and tried to offer them literature. Other Project Rescue participants approached the vehicle from the driver's side and exhorted the driver to open her window.

So as to not run over Schenck, the vehicle slowed down until it was inching along. At one point it momentarily stopped. Schenck eventually began to give ground and moved from the front of the vehicle to the driver's side. Once Schenck was away from the front of the vehicle, it was able to increase speed and move down the driveway into the parking lot.

At the hearing, neither Paul Schenck nor Robert Schenck could recall whether he was the person shown in the videotape

blocking the Volvo from entering the driveway. While the videotape does not show the face of the person blocking the vehicle as that person's face is covered by a red umbrella, the Court finds by clear and convincing evidence that the person who blocked the vehicle was Paul Schenck.

First, the Court finds the Schencks' inability to recollect the incident to be totally incredible. The Court cannot believe that anybody would forget such an incident, especially after being shown a videotape of it. This was not a normal everyday occurrence, even for the Schencks who testified that they are regularly involved in this type of activity. It was something that anybody would remember, particularly after seeing the videotape.

Second, David Crossland testified that it was Paul Schenck, not Robert Schenck, who blocked the vehicle, and defendants did not produce any credible evidence to rebut his testimony.

Finally, despite the fact that the person's face is not shown on the videotape, the Court is still able to determine from the tape that it was Paul Schenck under the umbrella. The videotape clearly shows that the person under the umbrella was wearing light gray slacks. As stated earlier, Paul Schenck was wearing light gray slacks that morning while Robert Schenck was wearing darker gray or black slacks. Thus, there can be no doubt that it was Paul Schenck who blocked and impeded the vehicle from entering the driveway that morning.[7]

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[7] It appears from the videotape that Paul Schenck intentionally used the red umbrella to hide his face from the camera. He held the umbrella between himself and the camera during the entire incident and then, after the vehicle finally was able to get by him, he purposely



Sometime later that morning, a young man and young woman exited the rear entrance of the clinic and walked up the driveway toward Northampton Street where their automobile was parked. When they reached the driveway entrance they encountered Paul Schenck who began to exhort them to stop and talk with him. He also offered them literature. The young man and young woman waved Schenck away and started to walk quickly toward their vehicle that was parked approximately one hundred feet down the street. Schenck pursued the couple and continued to ask them to stop and talk to him. The young man became increasing agitated and upset, and finally threatened to strike Schenck if he did not stop bothering him. The young woman also became upset and tried to calm the young man. The videotape shows that, at one point during the encounter, the young woman held up her hand to signal Schenck to cease and desist. Schenck ignored all requests by the couple to be left alone and pursued them all the way to their vehicle.

The Court finds that the Schencks were not entirely credible witnesses. Their answers to questions on cross-examination were very often evasive and nonresponsive. In fact, the Court finds that Paul Schenck made false statements under affirmation.

During cross-examination, Paul Schenck was asked whether he and his brother, at some point during the morning, switched neckties in order to make it more difficult for the "pro-choice" escorts to tell them apart. In response, Schenck consistently denied that he and his brother swapped ties. At the beginning of cross-examination, he gave the following testimony:

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retreated up Northampton with the umbrella strategically placed to hide his identity from the camera.

Q: Did you do anything that morning, or was there any effort that morning to confuse people as to the identity of yourself as opposed to your brother?

A: No.

Q: That morning, did you–did you ever change your coat with your brother?

A: No.

Q: You didn't exchange coats?

A: No.

Q: You didn't exchange slacks either, did you?

A: No.

Q: And you didn't exchange hats?

A: No, not–not intentionally. Hats were blowing off the heads repeatedly and it's possible we could have picked up the wrong one but no, not intentionally.

Q: And you didn't exchange ties?

A: No.

Transcript at 1999.

Later, he testified as follows:

Q: Did you ever change ties with your brother in the



alcove that morning?

A: In the alcove? No.

Q: The alcove to the post office?

A: In the vestibule?

Q: Did you change ties with your brother at any time that morning?

A: Not that I recall, No.

Transcript at 2007.

Schenck's statements denying that he and his brother switched neckties that morning were false. The videotape clearly and convincingly shows that they swapped ties. In fact, the tape shows that they also swapped eyeglasses. At 8:38 a.m., the tape shows Paul Schenck talking into the camera. He is wearing a tie with a polka-dot pattern and eyeglasses with tortoise shell frames. At 8:39 a.m., he turns around and starts walking north on Main Street toward the corner of Main and Northampton. He is then approached by Nancy Walker who begins talking to him. As Paul is walking slowly and listening to Walker, his brother Robert is walking ahead. The camera is positioned behind them. After listening to Walker, Paul Schenck calls to his brother who stops and turns around. The camera then shuts off. When the camera starts up again, the time is 8:43 a.m. The camera is now in front of the Schencks. It shows them adjusting their gloves and hats as they walk around the corner and head down Northampton Street. The tape clearly shows that Robert Schenck is now wearing the tie with the polka-dot pattern and the eyeglasses with the tortoise shell frames that his brother Paul was

wearing just a few minutes earlier. Likewise, Paul has on the tie and eyeglasses that were seen on Robert earlier in the tape. Thus, the videotape clearly establishes that between 8:39 and 8:43 a.m. the Schencks switched ties and eyeglasses. The only conceivable purpose for such a switch was to make it more difficult for people to tell them apart.[8] Accordingly, the Court finds that Paul Schenck made false statements under affirmation concerning a material matter, that is, whether he and his brother swapped ties to make identification more difficult and that his entire testimony is therefore suspect.[9]

The Court further finds that the Schencks' violations of the TRO were intentional. It is clear that, prior to arriving at 1241 Main Street that morning, the Schencks planned to violate the Order and then contend that their conduct was protected by the Freedom of Religion Clause of the First Amendment. This is demonstrated by the fact that the Schencks staged and orchestrated certain portions of the videotape in order to support their contention that they were present that morning only to evangelize and preach. There are many instances in the tape where the Schencks turn to the camera in order to explain that the literature they are distributing deals with religion rather than abortion. What the Schencks fail to understand, however, is that the TRO proscribes specific conduct, not speech or religion. Acts such as blocking the entrance to a clinic or trespassing on private property are pure conduct and are not protected by either the

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[8] It appears from the videotape that the idea to switch ties came from Nancy Walker.

[9] In light of the Court's finding that Rev. Schenck made false statements under affirmation, a possibility exists that a crime was committed, and the Court therefore has a duty to refer the matter to the United States Attorney for whatever action he deems appropriate.



Free Speech Clause or the Freedom of Religion Clause of the First Amendment. It does not matter whether these acts are motivated by the desire to stop abortion or the desire to spread one's religion. The acts themselves are unlawful regardless of the reasons they are committed.

Robert Schenck contends that he cannot be found in contempt of the TRO because he is not a named defendant and did not have notice. The evidence adduced at the hearing, however, showed clearly and convincingly that, while he is not a named defendant, Robert Schenck did have actual notice of the TRO.

For example, the testimony of Elizabeth Sholes established that on September 28, 1990, Robert Schenck was located outside an abortion clinic located at 666 Colvin Avenue, Kenmore, New York, when a United States Marshal read the TRO over a loudspeaker. Sholes testified that she was standing the same distance away from the speaker as Schenck and the announcement of the TRO was clearly audible.

In addition, Robert Schenck admitted during his testimony that, prior to December 29, 1990, he had read the TRO. He testified as follows:

> Q[Plaintiffs' Attorney]: Did you make an effort to become familiar with the terms of the temporary restraining order?
>
> A: I did ask individuals who had read it through.
>
> Q: But you never read through it yourself?
>
> A: I have to say that I did not in careful detail, no.

Transcript at 92.

The Court interprets Schenck's last response as an admission that he did read the TRO, albeit not in careful detail. If the Court were to interpret Schenck's response to mean that he never read the TRO, it would make his use of the words "in careful detail" superfluous. However, after considering Rev. Schenck's testimony throughout the hearing, it is clear that he is a man who picks and chooses his words with great care and deliberateness. Thus, the only interpretation possible is that he read the TRO, albeit not carefully. It follows, therefore, that he must have been in possession of TRO, at least long enough to have read it.[10]

## CONCLUSIONS OF LAW

### I. Standing

In Terry, the Second Circuit held that health care providers have independent standing to assert the rights of their patients to travel freely and to obtain abortion services. The court reasoned that a patient's "enjoyment of those rights is `inextricably bound up with the activity the litigant wishes to pursue,'" and thus, the court could be "assured that the clinics represent the rights and interests of the women seeking their assistance." Id. at 1348. The Terry court also held that "pro-choice" organizations had standing as representatives of their membership. Id. at 1349. Thus, plaintiffs have standing to enforce the Court's TRO.

---

[10] While Schenck denied having read the TRO in his earlier testimony, the Court rejects that testimony as not credible.



### II. Collateral Attack

Defendants, in arguing against the imposition of contempt sanctions, contend that the TRO is unconstitutional because it violates their First Amendment rights and is impermissibly vague and overbroad. The Court finds, however, that the collateral bar rule precludes defendants from challenging the validity of the underlying TRO as a defense against the imposition of contempt sanctions.

The collateral bar rule is longstanding and its purpose is clear.

> If a party can make himself a judge of the validity of orders that have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). "The orderly and expeditious administration of justice requires that `an order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" Maness v. Meyers, 419 U.S. 449, 459 (1975) (quoting United States v. United Mine Workers, 330 U.S. 258, 293 (1947)). "A `contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 441 n.21 (1986) (quoting Maggio v. Zeitz, 333 U.S. 56 (1948)).

The Supreme Court has applied the collateral bar rule

even when the underlying injunction may tread upon important First Amendment rights. In Walker v. City of Birmingham, 388 U.S. 307 (1967), the Court ruled that civil rights protestors, who were charged with contempt for marching in Birmingham without a parade permit in violation of a state court's temporary injunction, could not litigate the validity of the order in the contempt proceedings. The Court reached this conclusion despite serious reservations about the constitutionality of the underlying order. Id. at 317. The Court explained that:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Id. at 320-21.

In the instant case, the Court has jurisdiction over the parties[11] and the subject matter.[12] The Court finds that its TRO is not transparently invalid, but rather was carefully crafted to protect defendants' First Amendment rights. The TRO was in

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[11] The Court will discuss its jurisdiction over Rev. Robert Schenck in more detail below.

[12] The defendants did make a motion to dismiss the case based on the abstention doctrine. However, in a Decision and Order dated October 29, 1990, the Court denied the motion.



effect for two months before the alleged violations and throughout that entire period none of the defendants moved to modify or vacate the TRO. In fact, the defendants, through their attorney, consented to the extension of the TRO until the Court decided plaintiffs' motion for a preliminary injunction. Had defendants refused to consent to the extension of the TRO, the Court would have been faced with the option of: (1) letting the TRO expire in accordance with Fed. R. Civ. P. 65(b); or (2) immediately converting the TRO into a preliminary injunction thereby making it an appealable order. Thus, defendants had ample opportunity to challenge the validity of the TRO directly before this Court and before the Second Circuit Court of Appeals, rather than through a contempt proceeding. Instead, they chose to consent to an extension of the TRO.

## III. Civil Contempt Standard

A court can hold a party in civil contempt only when: (1) the order that the party allegedly failed to comply with is clear and unambiguous; (2) the proof of noncompliance is "clear and convincing"; and (3) the party has not been reasonably diligent and energetic in attempting to comply with the order. EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 594 (2d Cir. 1991); Terry, 886 F.2d at 1351. It is not necessary for the plaintiff to prove that the defendant willfully disobeyed the order. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Donovan v. Sovereign Sec. Ltd., 726 F.2d 55, 59 (2d Cir. 1984). After applying this standard to the instant case, the Court finds that Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue were in civil contempt of the TRO on December 29, 1990.

### A. The Order is Clear and Unambiguous

Fed. R. Civ. P. 65(d), requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." The Rule was intended to prevent an uncertain or vague decree from becoming the basis for a contempt citation. See Schmidt v. Lessard, 414 U.S. 473 (1974). To comply with the specificity and clarity requirements of Rule 65, an injunction must be specific and definite enough to give a person of ordinary intelligence fair notice of what conduct is prohibited. Terry, 886 F.2d at 1352 (citing In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985)); cf. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The Court finds that the conduct that lay between that which was prohibited and that which was permitted by the proscriptions of the TRO was sufficiently clear for defendants to ascertain precisely what they could and could not do. Thus, the TRO is sufficient to serve as a foundation for a contempt citation.

B. Proof of Noncompliance

Civil contempt petitions require proof by "clear and convincing evidence." Terry, 886 F.2d at 1352; SEC v. American Bd. of Trade, 830 F.2d 431 (2d Cir. 1987), cert. denied, 485 U.S. 938 (1988). "Clear and convincing evidence" is an intermediate standard of proof that is beyond a "preponderance of the evidence" standard, but not as stringent as "beyond a reasonable doubt."Addington v. Texas, 441 U.S. 418, 424 (1979). This standard is appropriate for the protection of "particularly important individual interests" that nevertheless do not implicate the fundamental liberty interests found in criminal cases. Id. The "clear and convincing evidence" standard is met by evidence that produces in the mind of the trier of fact "an abiding conviction that the truth of [the] factual contentions are 'highly probable.'"



Colorado v. New Mexico, 467 U.S. 310, 316 (1984). After applying the "clear and convincing evidence" standard to this case, the Court finds that plaintiffs have met their burden of proving defendants' noncompliance with the TRO on December 29, 1990.

The evidence adduced at the hearing clearly showed that both Paul and Robert Schenck violated ¶ 1(a) of the TRO. Paragraph 1(a) enjoins defendants from

> trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into, or egress from any facility at which abortions are performed in the Western District of New York . . . .

During the first incident at 7:54 a.m., the Schencks entered the alcove at the Main Street entrance to 1241 Main Street and stood shoulder to shoulder so as to effectively block the entrance. This conduct violated ¶ 1(a)'s proscriptions against trespassing and blocking access to the clinic.

During the second incident at 8:11 a.m., Paul Schenck again entered the alcove and was therefore trespassing in violation of the ¶ 1(a).

During the third incident at about 8:14 a.m. involving the automobile in the driveway entrance to the clinic, Paul Schenck blocked and impeded the women inside the vehicle from entering the clinic in violation of ¶ 1(a).

The evidence adduced at the hearing also established that Paul Schenck violated ¶ 1(b) of the TRO. Paragraph 1(b) states in pertinent part that:

> [N]o one is required to accept or listen to sidewalk counseling and . . . if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.

During the fourth incident involving the young man and young woman exiting the clinic and walking to their automobile, Paul Schenck refused to cease and desist from speaking to the couple even after they clearly manifested their desire that he do so. This was a clear violation of ¶ 1(b).

The Court also finds that Paul and Robert Schenck violated ¶ 1(d) of the TRO. Paragraph 1(d) prohibits "inducing, encouraging, directing, aiding, or abetting in any manner, others to take any actions [to violate the Order]." The Schencks clearly encouraged, aided and abetted each other in violating the TRO. For example, they swapped neckties and eyeglasses in order to confuse people as to their identity.

As stated earlier, the evidence adduced at trial also established clearly and convincingly that Paul and Robert Schenck were present at 1241 Main Street on December 29, 1990 as part of Project Rescue and in furtherance of its goals, and that the Schencks were acting in concert with each other, with Project Rescue and with the other Project Rescue participants present that morning. Thus, Project Rescue, through its participants, Paul and Robert Schenck, also failed to comply with the TRO.

C. Reasonable Diligence



The Court finds that defendants were not reasonably diligent and energetic in attempting to achieve compliance with the TRO. To the contrary, the Court finds that defendants intentionally violated the TRO.

IV. The Alcove as a Quasi-public Forum

Defendants argue they were not trespassing when they entered the alcove to the clinic because it is a quasi-public forum. They contend that, because the clinic allows "pro-choice" escorts to stand in the alcove with their aprons on that read "PRO-CHOICE ESCORT," the alcove has been transformed into a quasi-public forum and therefore anybody can go into the alcove to demonstrate or distribute literature. This argument is without merit.

The entrance to a health care facility is not the legal or practical equivalent of an airport terminal or a shopping mall. It has none of the indicia of being open to all sorts of public activity and gatherings that have prompted courts to find that airport terminals and malls are public forums akin to public sidewalks or parks. In fact, numerous courts[13] have found that health care facilities are places where calm and quiet must be maintained, and that demonstrating activities of the sort associated with public or quasi-public forums are antithetical to that environment. See Beth Israel Hosp. v. NLRB, 437 U.S. 483, 507-08 (1978); Grayned v. Rockford, 408 U.S. 104 (1972); Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 670 F.2d 629, 632 (5th Cir. 1982).

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[13] Including this Court in the February 14, 1992 Preliminary Injunction Decision and Order.

V. Project Rescue

Project Rescue argues that it is a movement and not an entity capable of being held in contempt. However, in its February 14, 1992 Preliminary Injunction Decision and Order, the Court has already held that "Project Rescue possesses adequate characteristics of a legal entity to be enjoined or held in contempt." This is the law of the case.

Project Rescue also argues that it does not have the capacity to be sued under Fed. R. Civ. P. 17 since it is not a corporation or partnership. However, Rule 17 clearly states that an "unincorporated association . . . may . . . be sued in its common name for the purpose of enforcing . . . against it a substantive right under the Constitution or laws of the United States . . . ." Here, plaintiffs claim that Project Rescue is part of a conspiracy to deprive women of their constitutional rights to obtain an abortion and to travel interstate. Thus, Project Rescue does have the capacity to be sued.

VI. Notice to Robert Schenck

Robert Schenck contends that he cannot be found in contempt of the Court's order because he is not a named defendant and did not receive notice. The Court rejects this argument

Fed. R. Civ. P. 65(d) states in pertinent part that:

> [E]very restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or



otherwise.

As stated earlier, the Court finds by clear and convincing evidence that Robert Schenck had actual notice of the TRO. He admitted that he read it prior to December 29, 1990. Further, he was present on September 28, 1990 when the TRO was read over a loudspeaker by a United States Marshal. In addition, as stated earlier, the Court finds by clear and convincing evidence that Robert Schenck was acting in concert with other named defendants when he violated the TRO on December 29, 1990. Thus, Robert Schenck was bound by the TRO under Rule 65(d).

VII. Amount and Disposition of the Fines

When imposing civil contempt sanctions for the purpose of coercing compliance with a court order, a court should consider (1) the character and magnitude of the harm threatened by continued contempt; (2) the probable effectiveness of the proposed sanctions; and (3) the financial consequences of the sanction on the contemnor and the consequent seriousness of the burden of the sanction upon him or her. Terry, 697 F. Supp. 1324, 1332-33 (1988); 886 F.2d at 1353. "The ultimate consideration is whether the coercive sanction–here, a fine–is reasonable in relation to the facts." Terry, 886 F.2d at 1353 (citations omitted).

The TRO provides that failure to comply will subject the contemnor to civil damages of $10,000 per day for the first violation. The TRO further provides that for successive violations, the contemnor will be subject to a civil contempt fine double that of the previous fines.

The Court finds that the character and magnitude of the harm threatened by Paul Schenck, Robert Schenck and Project Rescue's continued contumacy is such that a substantial sanction

is appropriate. Unless they are sanctioned, their conduct may be emulated by other defendants and "pro-life" activists. Further, none of the defendants have made a showing that they would be unduly burdened by a substantial sanction.

Accordingly, the Court will order Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue to each pay $10,000 in damages to plaintiff Buffalo GYN Womenservices. Buffalo GYN Womenservices has made an uncontested showing of both actual injury, in the form of disrupted daily operations and patients rendered upset and distressed, and compensable loss, consisting of the cost of extra security measures and additional staff. Given this showing of actual injury and compensable loss, the Court finds that it is appropriate to award damages to Buffalo GYN Womenservices for defendants unlawful conduct. See New York v. Shore Realty Corp., 763 F.2d 49, 54 (2d Cir. 1985); Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979).

In addition to the contempt sanction, plaintiffs also seek all costs and attorneys' fees associated with enforcing the Court's TRO. The TRO provides that a contemnor is liable "for all attorneys fees and related costs incurred by plaintiffs in relation to the enforcement of this Order." In addition, it is well established that a successful complainant in a contempt proceeding is entitled to the reasonable costs of prosecuting the contempt, including attorneys' fees, if the violation of the court's order is found to have been wilful. Canterbury Belts, Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 39 (2d Cir. 1989); Vuitton, 592 F.2d at 130.

In this case, the TRO clearly put defendants on notice that they could be held liable for attorneys' fees and costs associated with enforcement of the Order. Thus plaintiffs are entitled to attorneys' fees and related costs. Further, the Court



finds that defendants' violations of the TRO were wilful.

## CONCLUSION

For the reasons stated, the Court grants plaintiffs' petition for civil contempt against Rev. Paul Schenck, Rev. Robert Schenck and Project Rescue. The Clerk of Court shall immediately enter judgments against Paul Schenck, Robert Schenck and Project Rescue in the amount of $10,000 each. In addition, the Court grants plaintiffs' request for reasonable attorneys' fees and costs associated with prosecuting the contempt. Plaintiffs shall file an affidavit of attorneys' fees and costs by October 16, 1992. Defendants shall have until November 6, 1992 to respond.

It is so ordered.

/s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: September 14, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

Plaintiffs-Appellees,

-v-

PROJECT RESCUE WESTERN NEW YORK, ET AL.,

Defendants,

PAUL SCHENCK and DWIGHT SAUNDERS,

Defendants-Appellants.

ORDER
92-7302

[Filed Dec. 30, 1994]

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A petition for rehearing containing a suggestion for a rehearing in banc having been filed by appellees, and

A poll of the judges in regular active service having been requested and taken, and a majority of the active judges of the Court having voted to rehear the appeal in banc, limited to the two issues identified in the appellees' suggestion for rehearing in banc,

It is hereby ORDERED that the appeal will be heard in banc, limited to the issues of whether the District Court erred in including in the injunction the provision concerning a 15-foot buffer zone and the "cease and desist" provision. The in banc court will consist of all the active judges of the Court and senior



Judges Oakes and Meskill, who were members of the panel. See 28 U.S.C. § 46(c).

The appellants' brief shall be filed by February 10, 1995, the appellees' brief shall be filed by March 17, 1995, the appellants' reply brief shall be filed by April 3, 1995, and oral argument will be held at the United States Courthouse, Foley Square, at 2:00 p.m., April 17, 1995.

FOR THE COURT

GEORGE LANGE III, Clerk
By: /s/ Kathleen Brouwer
Kathleen Brouwer
Operations Manager

Dated: New York, NY
December 30, 1994

JON

WDNY/bfny
90-cv-1004
ARCARA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of February, one thousand nine hundred and ninety-five.

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PRO-CHOICE NETWORK, of Western New York, ET AL.,
Plaintiffs-Appellees,

v. 92-7302

REV. PAUL SCHENCK, ET AL.,
Defendants-Appellants.

PROJECT RESCUE WESTERN NEW YORK, ET AL.,
Defendants.

---

ORDER
[Filed Feb. 2, 1995]

The mandate of this Court having been issued inadvertently on October 3, 1994, and recalled on October 13, 1994; the District Court having modified the preliminary injunction on October 13, 1994, to conform to the panel's opinion; and the Court of Appeals having ordered a rehearing in



banc on December 30, 1994, it is hereby Ordered that the District Court's preliminary injunction, as originally issued on February 14, 1992, is reinstated pending disposition of the appeal.

FOR THE COURT

/s/ Jon O. Newman
JON O. NEWMAN, Chief Judge.

No. 95-1065

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

REVEREND PAUL SCHENCK AND
DWIGHT SAUNDERS,

*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. In *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), this Court rejected the "reasonable time, place and manner" analysis for injunctions and instead mandated the more rigorous standard of "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court required "precision of regulation" with regard to injunctive relief which burdens speech, protecting and separating peaceful speech from unprotected and non-speech activities. Against this background the first question presented is:

> Whether the *in banc* decision of the Second Circuit Court of Appeals erred in upholding a provision of an injunction which prohibits all speech within overlapping fifteen foot floating no-speech zones (which create fifteen-foot no-speech zones around the abortion facility entrances and driveways and all pedestrians and vehicles) on public sidewalks and streets outside abortion facilities as the most precise way to ensure access to the abortion facility and promote public health and safety in the context of overwhelmingly peaceful demonstrations and a lack of any finding that a less restrictive injunction could not accomplish the same goals.

2. Again, in the context of the *Madsen* and *Claiborne* decisions above, and particularly this Court's holding in *Madsen* that "no-approach" zones are unconstitutional restrictions on free speech:

> Whether the Second Circuit's *in banc* decision upholding the "cease and desist" provision in the injunction below, based as it is on the dislike by a communicatee of the words being spoken by a communicator, is in conflict with this Court's decision in *Madsen* which held that the "no-approach" zone

burdened more speech than necessary and which reaffirmed the unconstitutionality of content-based restrictions on speech under the First Amendment to the United States Constitution.



## PARTIES

The names of both petitioners appear in the caption of this case. Neither of the petitioners is a corporation. *See* Rule 29.6.

The respondents are as follows: Pro-Choice Network of Western New York; Buffalo GYN Womenservices, P.C.; Erie Medical Center; Paul J. Davis, M.D.; Shalom Press, M.D.; Barnett Slepian, M.D.; Morris Wortman, M.D.; Highland Obstetrical Group, P.C.; and Alexander Women's Group.

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## DECISIONS BELOW[1]

The decision of the district court granting a preliminary injunction is reported as *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992) (Pet. App. A-138). The later decision of the district court dismissing respondents' claim under 42 U.S.C. § 1985(3) and declining to vacate the preliminary injunction is reported as *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 828 F. Supp. 1018 (W.D.N.Y. 1993) (Br. App. 1a). The decision of the Second Circuit dismissing an appeal from certain civil contempt judgments is reported as *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) (Pet. App. A-116). The decision of the Second Circuit panel in the present appeal is reported as *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 359 (2d Cir. 1994) (Pet. App. A-79). The decision of the *in banc* Second Circuit in the present appeal is reported as *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (in banc) (Pet. App. A-1).

## JURISDICTION

The *in banc* U.S. Court of Appeals for the Second Circuit entered its decision and judgment in this case on September 28, 1995. Petitioners filed their petition for writ of certiorari on December 27, 1995. This Court granted the petition on March 18, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

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1. In this brief, "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari, "Br. App." refers to the Appendix to this brief, and "JA" refers to the Joint Appendix.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

## STATEMENT OF THE CASE

### Facts

Respondents (plaintiffs below) consist of the Pro-Choice Network of Western New York, an organization "dedicated to maintaining . . . access to . . . abortion," Second Amended Complaint [2d Am'd Cplt.] ¶ 5 (JA 35), along with various abortion facilities and physicians who practice abortion, 2d Am'd Cplt. ¶¶ 6-13 (JA 35-36).

Petitioners Rev. Paul Schenck, a minister, and Dwight Saunders, an attorney, are two of the numerous individuals and organizations named as defendants in the present case.[2] 2d Am'd Cplt. ¶¶ 17, 20 (JA 38, 39). The defendants are all "opposed to abortion and dedicated to the pro-life movement." *Pro-Choice Network of Western New York v. Project Rescue Western New York* [*P.C. Network I*], 799 F. Supp. 1417, 1422 (W.D.N.Y. 1992) (footnote and internal quotation marks omitted). Respondents accused the defendants of engaging in "disruption of the operations of abortion . . . facilities." 2d Am'd Cplt. ¶¶ 14-65 (JA 37-53).

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2. At the time of the evidentiary hearings in this case, Rev. Paul Schenck had already served ten years as pastor of New Covenant Tabernacle, an Assemblies of God congregation in Tonawanda, New York, and was pursuing a doctoral degree in ministry. Dkt. 140, pp. 1843-44 (Tr. of 11/1/91). Dwight Saunders maintained a private legal practice in Williamsville, New York. JA 39.



The district court found that the defendants organize and participate in pro-life demonstrations[3] at abortion facilities throughout Western New York. 799 F. Supp. at 1423. The court expressly found that these demonstrations "are usually peaceful in nature," though there "often" are "emotionally charged encounters" between demonstrators, patients, and patient "escorts." *Id.*

The district court identified three different types of pro-life demonstrations: (1) physical blockades; (2) "constructive" blockades; and (3) "sidewalk counseling." *Id.*

With respect to the first category, defendants stipulated, prior to the preliminary injunction hearing, that the court could enjoin physical blockades. *Id.* at 1424 n.5. *See also* Pet. App. A-134 (text of stipulation). As the court found, "there have been no physical `blockades' since the [district c]ourt issued the TRO." 799 F. Supp. at 1424 n.5.

The district court used the second category--"constructive blockades"--as a label for "demonstrating and picketing" at abortion facilities. *Id.* at 1424. The court found that these demonstrations did *not* "physically block[] patient access to the clinics," *id.* The court found the purpose of these demonstrations to be "to prevent or dissuade patients from entering the clinic." *Id.* The court pejoratively described the demonstrators as creating a "gauntlet of harassment and intimidation in the hope that the patients will turn away before entering." *Id.* This "harassment and intimidation" apparently consisted of "demonstrators . . . congregat[ing]" near driveway entrances and parking lots, making "loud and disruptive noises,"

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3. The district court used the term "rescue" demonstrations to refer to all pro-life demonstrations. Because the term "rescue" more commonly refers to a pro-life "sit-in" or "blockade," this brief will avoid using this potentially confusing term.

and "chant[ing] persistently," *id.* "At times," the court added, demonstrators "yell" at people, "crowd around people," and "grab, push and shove" people. *Id.*

The third category of pro-life activity the district court found to have taken place was "sidewalk counseling." "Sidewalk counseling consists of proffering literature to women entering [abortion] facilities and trying to convince them not to undergo an abortion." *Id.* The court found that, "because of the highly emotional nature of the abortion issue," even peaceful counseling can become "a charged encounter" between counselors, patients, and "escorts." *Id.* at 1425.

The district court found that respondent Pro-Choice Network of Western New York "organizes some of its members to serve as escorts for [abortion] patients . . . ." *Id.* at 1421-22. These "escorts":

> become frustrated and angry by the persistence of the "sidewalk counselors." The patient escorts often respond by raising their voices in order to drown out the "counselors'" message, and attempt to block and impede the "sidewalk counselors" from following the patients . . . . [T]he evidence adduced at the hearings clearly shows that their behavior often serves only to exacerbate an already difficult situation.

*Id.* at 1425 n.6.

The court found that "the decision to undergo an abortion is . . . difficult and stressful" and that exposure to pro-life demonstrations can cause "additional stress and anxiety." *Id.* at 1427. The district court did *not* dispute that the "additional stress" experienced by women who encountered demonstrators resulted in large part from (1) the *message* of the demonstrators and sidewalk counselors; and (2) the misconduct of the pro-abortion "escorts."



Course of Proceedings

Respondents filed suit in the U.S. District Court for the Western District of New York on September 24, 1990, JA 1. Respondents sought immediate injunctive relief, alleging that defendants planned to conduct a "rescue" blockade, four days later, somewhere in western New York. JA 33-34, 59.

Respondents' complaint[4] listed seven causes of action, including one federal claim and six state-law claims. The federal claim alleged a violation of 42 U.S.C. § 1985(3). JA 33, 64.[5] The state claims alleged violation of, *inter alia*, New York Civil Rights Law and common law trespass. JA 65, 66.

The same day that respondents filed their complaint, the district court granted an order to show cause why a temporary restraining order (TRO) should not issue and setting a hearing on the TRO for September 26, 1990 (i.e., two days later). At that hearing the district court orally granted a TRO. JA 2. The next day, the court signed a written TRO. JA 1.

The TRO applied to all abortion facilities in the Western District of New York (which includes Buffalo and Rochester). The order enjoined a miscellany of misconduct, including

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4. By the time the district court issued the preliminary injunction which is the subject of this appeal, respondents had filed an Amended Complaint (dkt. 24) (JA 3), a Second Amended Complaint (dkt. 36) (JA 4), and a Third Amended Complaint (dkt. 72) (JA 8). These amendments did not alter the causes of action alleged. For ease of reference, this brief will cite to the Second Amended Complaint, which appears in the Joint Appendix (JA 31). *See also* Notation regarding Third Amended Complaint (JA 78).

5. The district court subsequently dismissed this claim. *See Pro-Choice Network of Western New York v. Project Rescue Western New York* [*P.C. Network II*], 828 F. Supp. 1018 (W.D.N.Y. 1993) (Br. App. 1a).

trespass, blocking or obstructing access, physically abusing or tortiously harassing persons entering or leaving abortion facilities, and making excessive noise that disturbs patients or staff. JA 23. The TRO also enjoined defendants from

> (a) . . . demonstrating within 15 feet of any person seeking access to or leaving such facilities, except that sidewalk counseling by no more than two persons as specified in paragraph (b) shall be allowed;
>
> (b) . . . Provided, however, that sidewalk counseling, consisting of a conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, or who is sought to be counseled who wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event the persons seeking to counsel that person shall cease and desist from such counseling of that person.

JA 23. This TRO remained in effect, first by extension and then by consent, pending the district court's ruling on respondents' motion for a preliminary injunction. JA 2 (dkt. 17), 3 (entry for 10/19/90; dkt. 34; dkt. 35).

As the district court found, defendants "complied with the TRO by holding a peaceful demonstration, rather than a `blockade,' on September 28, 1990." *P.C. Network I*, 799 F. Supp. at 1422.

At a hearing on October 4, 1990, the district court gave a "clarification" of the scope of the TRO. JA 27. In response to concerns expressed about the applicability of the order to clergy preaching against abortion in church, the court stated that the TRO "is directed to activities at the sites chosen for



demonstration." JA 29.

On October 22, 1990, respondents moved for contempt sanctions against defendants Bonnie Behn and Carla Rainero for allegedly violating the TRO on one date. JA 3 (dkt. 29, 30); *see* JA 103. On December 6 and 14, 1990, respondents moved for civil contempt sanctions against defendant Nancy Walker for allegedly violating the TRO on three separate dates. JA 4 (dkt. 40, 41, 44, 45); *see* JA 80. On March 26, 1991, respondents moved for civil contempt sanctions against petitioner Rev. Paul Schenck, nonparty Rev. Robert Schenck, and defendant Project Rescue Western New York, for allegedly violating the TRO on one date. JA 8 (dkt. 74); *see* JA 122-23.

For purposes of the preliminary injunction, the defendants offered to stipulate to the entry of an injunction barring them from blocking or obstructing access or trespassing. Defendants' Stipulations (Pet. App. A-134).

From February 1991 through January 1992, the district court held evidentiary hearings on both the propriety of a preliminary injunction and the merits of various civil contempt charges. JA 4-16. Based upon the evidence presented at these hearings, the district court granted a preliminary injunction on February 14, 1992. JA 16 (dkt. 126); Pet. App. A-138.

The district court acknowledged the well-established requirements for granting a preliminary injunction. *P.C. Network I*, 799 F. Supp. 1428. With regard to the necessity of showing a likelihood of success on the merits, the court held that respondents had made the requisite showing on three of their claims. First, the district court ruled that respondents were likely to prevail on their federal claim under 42 U.S.C. §

1985(3).[6] 799 F. Supp. at 1429-31. Second, the district court ruled that "[h]aving demonstrated a likelihood of success on the merits of their federal § 1985(3) claim, [respondents] have also, by definition, demonstrated a likelihood of success of their claim under [the state antidiscrimination statute,] § 40-c." 799 F. Supp. at 1431. Third, the district court held that respondents were likely to prevail on their state trespass claim. *Id.* at 1431-32. Given these holdings, the district court declined to address "whether a preliminary injunction should be granted based on [respondents'] other state law claims." *Id.* at 1432 n.11.

The preliminary injunction, like the TRO, applied to all abortion facilities in the Western District of New York. Pet. App. A-183. The injunction renewed the prohibition on trespassing, blocking or obstructing access, physically abusing patients or staff of abortion facilities, and making excessive noise. Pet. App. A-183 to A-184. In place of the TRO's ban on "tortiously harassing," the preliminary injunction forbade "grabbing, touching, pushing, shoving or crowding" persons coming or going at abortion facilities. Pet. App. A-184. The injunction also enjoined defendants from:

> (b) demonstrating within fifteen feet from either side or edge of, or in front of, doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities, or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed;

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6. This Court subsequently rejected the application of this same statute in a similar case. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In light of *Bray*, the district court later dismissed respondents' § 1985(3) claim. Br. App. 1a.



> (c) . . . provided, however, that sidewalk counseling consisting of a conversation of a nonthreatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants to not have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility.

Pet. App. A-183 to A-184. The district court did not attribute any special significance to the arbitrary fifteen-foot distance the court selected for its injunctive zones.

Petitioners appealed from the preliminary injunction. JA 17 (dkt. 136).

The district court subsequently ruled on the contempt motions heard prior to the issuance of the preliminary injunction. The court granted the motion in part as to defendant Nancy Walker, JA 79 (dkt. 238), granted the motion as to defendants Bonnie Behn and Carla Rainero, JA 102 (dkt. 241), and granted the motion as to petitioner Paul Schenck, nonparty Rev. Robert Schenck, and Project Rescue Western New York, JA 121 (dkt. 250).[7] The court found that for one

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7. On January 3, 1992, after the hearings on the preliminary injunction and the contempt motions had concluded, respondents filed another motion for civil contempt, this time accusing petitioner Rev. Paul Schenck and nonparty Rev. Daren Drzymala of violating the TRO. JA 15 (dkt. 124). The district court did not hold hearings on this motion

incident Walker was guilty of trespass (entering a parking lot), harassment (following a group of three women closely and loudly admonishing them that "Abortion is murder, you'll go to hell, we can help you, don't go in there"), failing to cease and desist counseling (when asked to leave them alone) and entering the fifteen-foot fixed zone (following the women to within some four feet of an entrance). The court found that for another incident Walker was guilty of harassment (following two women closely while "importun[ing]" them loudly), failing to cease and desist counseling (when asked to leave them alone), and entering the fifteen-foot fixed zone (by following the women to the entrance). JA 83-87, 95-96. The court found that for one incident Behn and Rainero were guilty of failing to cease and desist counseling a woman and her two male companions when the woman asked them to leave her alone. JA 106-09, 116-17. The court found that the Revs. Paul and Robert Schenck were guilty of trespassing (by entering the alcove portion of a building entrance), blocking (by standing briefly at that entrance, although the court did not find that the Schencks intended to block anyone or that anyone was trying to enter), and "encouraging . . . aiding, [and] abetting" each other to violate the TRO. The court also found Rev. Paul Schenck guilty for incidents that same day of trespass (reentering the alcove), blocking vehicular access (by standing too close to a car while counseling the occupants), and failing to cease and desist counseling a young couple (after the woman "held up her hand to signal" Rev. Schenck to cease and her companion ultimately "threatened to strike Schenck"). JA 126-33, 143-44. The court held each contemnor liable for a $10,000 "civil" sanction plus attorney fees and costs. J.A. 101, 119, 149.

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until after issuance of the preliminary injunction. *See* JA 18-19.



The alleged contemnors all appealed their contempt judgments.[8]

Petitioners' temporarily withdrew their appeal of preliminary injunction, by stipulation, pending this Court's decision in a case reviewing the use of 42 U.S.C. § 1985(3) against pro-life activists. After that decision issued, *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), petitioners reactivated their appeal. The parties then stipulated to the temporary withdrawal of the appeal pending the Second Circuit's ruling in the contempt appeals of Walker, Behn, and Rainero.

Meanwhile, the district court, in light of this Court's *Bray* decision, dismissed respondents' claim under 42 U.S.C. § 1985(3). *P.C. Network II*, 828 F. Supp. 1018 (Br. App. 1a). The district court declined, however, to relinquish pendent jurisdiction over the respondents' state law claims, and likewise declined to vacate the preliminary injunction. *Id.*

Petitioners then simultaneously appealed from the district court's refusal to vacate the preliminary injunction and reactivated their appeal from the original order granting the preliminary injunction.

A panel of the Second Circuit heard both of petitioners' appeals together on March 24, 1994. JA 20. While the appeals were under submission, this Court decided *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). After receiving letter briefs addressing *Madsen*, *see* JA 21, the panel issued its opinion

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8. None of these appeals have yet been decided on the merits. The Second Circuit dismissed the appeals of Walker, Behn, and Rainero, holding that a party may not appeal an interlocutory judgment of civil contempt. *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993) (Pet. App. A-116). The appeals of Paul and Robert Schenck were settled and dismissed by stipulation.

on September 6, 1994. *Pro-Choice Network of Western New York v. Schenck* [*P.C. Network III*], 67 F.3d 359 (2d Cir. 1994) (Pet. App. A-79).

The Second Circuit panel unanimously upheld the district court's refusal to vacate the preliminary injunction and upheld the bulk of the injunctive provisions. By a divided vote, the panel overturned as unconstitutional the 15-foot speech-free zones and the cease-and-desist requirement for sidewalk counselors. Senior Circuit Judge Oakes dissented from the panel's decision to reverse these portions of the injunction.

Respondents sought and obtained a 10-day extension of time to file a petition for rehearing. When that extended period elapsed and respondents had still filed no petition, the mandate of the court of appeals issued.[9] Respondents then filed an untimely petition for rehearing with suggestion for rehearing *in banc*. Respondents moved for leave to file out of time and to recall the mandate. The Second Circuit granted the motion and recalled the mandate. *See* JA 21.

The Second Circuit granted rehearing *in banc* limited to the two portions of the injunction which the panel had held unconstitutional. JA 150. Whereas the district court had, in the interim, modified the injunction to comply with the panel's ruling, Chief Judge Jon Newman ordered that the original preliminary injunction be reinstated. JA 152.[10]

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9. The issuance of the mandate raises the question whether the Second Circuit lacked jurisdiction to act further in the appeal.

10. Judge Newman's extraordinary *sua sponte* order refers to the mandate as having issued "inadvertently." This is false. The clerk of the Second Circuit properly issued the mandate when respondents failed to file a timely petition for rehearing. Fed. R. App. P. 41(a).



After a new round of briefing and oral arguments, the *in banc* Second Circuit issued its decision upholding the preliminary injunction in full, with one minor modification. *Pro-Choice Network of Western New York v. Schenck* [*P.C. Network IV*], 67 F.3d 377 (2d Cir. 1995) (*in banc*) (Pet. App. A-1).

The fifteen judges sitting for the Second Circuit's *in banc* ruling produced five separate opinions. Nine judges signed onto the lead opinion of Judge Oakes. Ten judges signed onto an opinion Judge Winter wrote "concurring in the result." Two judges (who were among those signing onto the Winter opinion) joined onto another opinion, by Judge Jacobs, concurring in the result. In addition, the two members of the original panel majority each wrote dissenting opinions.

The Second Circuit upheld the preliminary injunction as written, with one modification. The preliminary injunction had required sidewalk counselors to "cease and desist" from such counseling "if anyone or any group of persons who is sought to be counseled *wants* to not have counseling, *wants* to leave, or walk away," Pet. App. A-184 (emphasis added). Viewed literally, this provision required sidewalk counselors to read the mind (or heart) of the person counseled in order to know whether to "cease and desist." The district court, however, had stated that the "cease and desist" provision applied whenever the person spoken to "indicates, either verbally or nonverbally, that they do not wish to be counseled . . . ." *P.C. Network I*, 799 F. Supp. at 1434. The Second Circuit ruled that requiring persons being counseled to "indicate," verbally or nonverbally, their unwillingness to be counseled, "accords a common sense meaning to the provision and makes clear at what point counseling must cease." 67 F.3d at 391. The Second Circuit therefore "direct[ed] the district court on remand to so modify the language of the injunction." *Id.*

## SUMMARY OF ARGUMENT

The decision of the *in banc* Second Circuit, upholding the preliminary injunction at issue here, strikes at the heart of the public forum doctrine of the First Amendment. Never in the history of American jurisprudence has this Court upheld an injunction prohibiting peaceful, non-threatening speech on public sidewalks outside a business facility in the absence of a showing that access to the facility is obstructed. "[W]hat was done by [petitioners] – the picketing, the leafletting, the voicing of protest – was done in the finest tradition of the First Amendment, hardly justifying so sweeping an abridgement of free speech." 67 F.3d at 399 (Meskill, J., dissenting). Yet the court below upheld drastic restrictions on such expressive activity in traditional public fora outside all abortion facilities in the Western District of New York.

The Second Circuit justified these sweeping restrictions as necessary to protect the right of "[t]he timid . . . to go about their business," *id.* at 396 (Winter opinion). The court opined that

> targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to protests.

*Id.* Whether in a public forum or a nonpublic forum, *id.* At 397, expressive activity, the court below held, must yield to injunctive restraint, even if "no one is physically injured, traffic moves, and private property is not invaded," *id.* This "unprecedented and unwarranted incursion on freedom of speech," *id.* at 410 (Altimari, J., dissenting), essentially creates a new "right" – the right "not to be hassled in public."

The preliminary injunction (1) forbids petitioners from



"demonstrating" within fifteen feet of any entrance or driveway of any abortion facility ("fixed buffer zones"); (2) forbids petitioners from "demonstrating" within fifteen feet of "any person or vehicle" coming to or going from any abortion facility (the "floating bubble zones"); (3) allows no more than two people to enter these various zones in order to engage in "sidewalk counseling consisting of a conversation of a nonthreatening nature," except that if "anyone or any group of persons" counseled "indicates, either verbally or non-verbally, that they do not wish to be counseled," the counselors must "cease and desist from such counseling" and thereafter abide by the fifteen-foot zones ("cease and desist" provision).

Injunctive restrictions on expressive activity face rigorous scrutiny. The prior restraint doctrine renders many such injunctions presumptively unconstitutional. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). Even injunctions which do not trigger the prior restraint doctrine face heightened constitutional review. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Under either standard, the restrictions challenged here are unconstitutional.

First, the "floating bubbles," "fixed buffers," and "cease and desist" restrictions all fail for want of a countervailing private interest, i.e., a supporting cause of action. The district court predicated its injunction upon a finding that respondents were likely to prevail on three of their claims. The district court has dismissed the first of these claims (brought under 42 U.S.C. § 1985(3)), on the merits, in light of a subsequent decision of this Court (*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)). The district court's ruling on the second claim (brought under a state antidiscrimination statute) rested, "by definition," on the court's holding regarding the first claim, and so falls with it. The third cause of action is state trespass, which cannot

justify restrictions on *nontrespassory* expressive activity. In short, the challenged injunctive restrictions on expressive activity in public forum property no longer have any legal legs on which to stand. The First Amendment forbids – under *any* test – a restriction on speech which is not appropriately tailored to further some countervailing interest. In this case, respondents have no competing claim (on which they are likely to prevail) even to place in the balance, much to override petitioners' rights; hence, these injunctive restrictions are unconstitutional.

The "cease and desist" provision independently violates the First Amendment. First, by cutting off even peaceful communication and subjecting speech in a public forum to the consent of the audience, the "cease and desist" provision is indistinguishable from the "no approach" zone this Court overturned in *Madsen*, 114 S. Ct. at 2529. Even apart from the square holding of *Madsen*, the "cease and desist" provision founders upon several important First Amendment doctrines. This restriction imposes an impermissible "audience veto," *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and subjects speech to an unconstitutional, wholly arbitrary licensing scheme, *e.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). This restriction is also unconstitutionally vague, requiring petitioners on pain of hefty contempt sanctions to decipher "verbal or nonverbal indications" that a person or group of persons might not want to be counseled. The "captive audience doctrine" cannot save this restriction because the injunction operates in a public forum where the audience is free to leave.

The "fixed buffer zones" and "floating bubble zones" are factually unjustifiable. The record in this case contains neither a *Madsen*-esque history of persistent obstruction (as a majority



of the Second Circuit agreed, 67 F.3d at 397 (Winter, J., concurring–ten judges), 399 (Meskill, J., dissenting–two judges)) nor a failure of an initially narrower injunction. Indeed, the court imposed floating bubble zones in the initial TRO, i.e., as a *first* resort. These invisible speech-free zones prohibit far more speech than necessary, banning even peaceful picketing, leafletting, and verbal communications. The prohibition of "demonstrating" in these zones is also unconstitutionally vague.

The "fixed bubble zones" reveal a gross lack of tailoring. This arbitrary, one-size-fits-all restriction applies to many different facilities regardless of their varying physical characteristics.

The "floating bubble zones" effectively ban all demonstrating as they waft along streets and sidewalks, forcing demonstrators to scurry and dodge–or stay home. Moreover, the floating zones are vague with regard to where they apply (i.e., how far from an abortion business) and to whom (a "person . . . seeking access to or leaving [abortion] facilities," but not to anyone else) and gravely chilling in that it is impossible to gauge fifteen-foot distances precisely, especially when both the floating bubble and the "demonstrator" are moving.

## ARGUMENT

### I. INTRODUCTION

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

The allegation has been made that judges and even Supreme

Court Justices deciding cases in the abortion context have "worked a major distortion in . . . constitutional jurisprudence," and that "no legal rule or doctrine is safe from ad hoc nullification" in such litigation. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'CONNOR, J., joined by REHNQUIST, J., dissenting); *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2535 (1994) (SCALIA, J., joined by KENNEDY and THOMAS, JJ., dissenting). The notion of impartial adjudication – the core of any judicial system – obviously requires the rejection of this pernicious "abortion distortion factor."[11]

"Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection." *Roe v. Wade*, 410 U.S. 113, 116 (1973). *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 124 (1992) ("In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First . . . Amendment[] are violated . . ."). Accordingly, this Court must address the present petition independent of the national controversy out of which it arises.

Four of the Second Circuit judges below expressly opined that abortion had distorted that court's analysis of the appeal. 67 F.3d at 398 (Jacobs, J., joined by Mahoney, J., concurring) (charging lead opinion with being "message specific"); *id.* at 404 (Meskill, J., joined by Altimari, J., dissenting) ("Once again, we see the abortion ad hoc nullification machine at work"). It is therefore particularly important for this Court forcefully to reject the notion that *Roe v. Wade*, 410 U.S. 113 (1973), somehow created an exception to the First Amendment. There

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11. The severity of the temptation to sacrifice neutral principles in abortion cases was starkly illustrated in the court below by the appearance of the U.S. Department of Justice and the national ACLU as amici in support of restrictions on speech in public places.



are not different First Amendment rules for abortion protesters on the one hand, and news reporters, civil rights demonstrators, and so forth, on the other. Free speech is not the exclusive prerogative of those embracing politically favored causes or fashionable points of view.

## II. THE CHALLENGED INJUNCTIVE PROVISIONS RESTRICT CLASSIC FREE SPEECH IN PUBLIC FORA.

The fixed and floating 15-foot speech-free zones and the "cease-and-desist" provision restrict classic forms of peaceful expression in public fora, namely, picketing and sidewalk counseling.

Picketing consists of the carrying of placards or banners while standing or walking in a particular location. Picketing represents both a public witness directed to all passersby and a reproach to those patronizing or performing the work of the picketed facility. A picketer's activity expresses many different messages, including: the testimony of one's mere willingness to stand up in public; the calling of attention to a given facility engaged in some controversial practice; and, the visual broadcasting of a particular message displayed on a sign or banner. "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern." *Carlson v. California*, 310 U.S. 106, 112-13 (1940). *Accord United States v. Grace*, 461 U.S. 171 (1983); *Boos v. Barry*, 485 U.S. 312 (1988).

Sidewalk counseling consists of personal communication with pregnant women, their companions, or passersby, typically by conversation or by the distribution of written literature. *Cf.* 799 F. Supp. at 1424. "[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*,

115 S. Ct. 1511, 1519 (1995) (and cases cited). *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lovell v. Griffin*, 303 U.S. 444 (1938). The sidewalk counselor seeks not so much to broadcast a message to the world as to touch the mind, heart, and conscience of particular individuals. The goal of the sidewalk counselor is to offer information and assistance to help a woman carry her baby to term.[12] The sidewalk counselor may also offer a final appeal to the conscience of those struggling with their own ambivalence over the distressing decision to abort an unborn child.[13] Such verbal persuasion and protest rest at the very heart of the right to free speech. *City of Houston v. Hill*, 482 U.S. 451 (1987); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). "In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views," *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 798 (1985); for this reason, "the most effective, fundamental, and perhaps economical avenue of political discourse [is] direct one-on-one communication." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

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12. Dkt. 88a, pp. 1255-56, 1265-67, 1271-72 (Tr. of 3/26/91) (witness Karen Prior).

13. Respondent Morris Wortman, M.D., testified as follows:

> Q. Have you ever had a woman come in for a scheduled abortion who seemed uncertain or ambivalent about it? A. Every week. Every day.
>
> Q. It's a regular occurrence then, I take it? A. Absolutely.
>
> Q. It's daily? A. Daily.

Dkt. 92, p. 930 (Tr. of 3/20/91). Some women change their minds after talking with sidewalk counselors. *E.g.*, dkt. 88a, pp. 1272 (Tr. of 3/26/91). One such woman testified in this case. Dkt. 91, pp. 1825-51 (Tr. of 4/1/91).



Ideally, picketers and sidewalk counselors will practice perfect charity with all persons, firm resolution in their dedication to principle, and unflinching patience in the face of hostility to their message. Nevertheless, some picketers and counselors will occasionally fail to say just the right thing in just the right way. Some may even utter what seem to be "vehement, caustic, and sometimes unpleasantly sharp attacks" upon the views or conduct of their hearers. *Cf. New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This does not distinguish pro-life activists from adherents to any other cause. Nor does this consideration place picketing and sidewalk counseling outside abortion facilities beyond the bounds of quintessential First Amendment activity. "The right extends to the aggressive and disputatious as well as to the meek and acquiescent." *Martin v. Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring). While rhetoricians may debate the relative merits of verbal "honey" and "vinegar," the freedom of speech depends upon no judgment as to the wisdom, prudence, or polity of given communications. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Indeed, this Court has repeatedly recognized constitutional protection even for such "deeply offensive" speech as "virulent ethnic and religious epithets, *see Terminiello v. Chicago*, 337 U.S. 1 (1949), vulgar repudiations of the draft, *see Cohen v. California*, 403 U.S. 15 (1971), and scurrilous caricatures, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)." *United States v. Eichman*, 496 U.S. 318-19 (1990). *Accord Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2529 (1994) ("insulting, and even outrageous, speech").

In the present case, petitioners' expressive activity takes place on public sidewalks and streets, "the archetype of a traditional public forum." *Forsyth County*, 505 U.S. at 130 (internal

quotation marks and citation omitted). *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Boos*, 485 U.S. at 318; *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). "At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places." *ISKCON v. Lee*, 505 U.S. 672, 696 (1992) (KENNEDY, J., joined in pertinent part by Blackmun, STEVENS, and SOUTER, JJ., concurring in judgment). Therefore, "regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny." *Id.* at 678 (majority opinion of REHNQUIST, C.J., joined by White, O'CONNOR, SCALIA, and THOMAS, JJ.).

In sum, the preliminary injunction at issue here "operates at the core of the First Amendment," *Frisby v. Schultz*, 487 U.S. 474, 479 (1988), by imposing restrictions on classic forms of speech in traditional public fora.

## III. INJUNCTIVE RESTRICTIONS ON SPEECH TRIGGER A HEIGHTENED CONSTITUTIONAL STANDARD OF REVIEW.

In the present case, an even higher level of scrutiny applies because the restrictions at issue come in the form of an injunction. *Madsen*, 114 S. Ct. at 2524-26.

### A. Speech-Restrictive Injunctions Trigger Either the Prior Restraint Doctrine or the Heightened Scrutiny of *Madsen*.

Some injunctions qualify as prior restraints. *Id.* at 2524 n.2. ("Prior restraints do often take the form of injunctions") (citations omitted). Indeed, this Court has typically reviewed injunctive restrictions on expressive activities as presumptively unconstitutional prior restraints. *E.g.*, *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches, distribution of pamphlets, and display of materials); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings).



Even when a particular an injunction does not constitute a prior restraint, injunctive restrictions on expressive activity violate the right to free speech unless, at a minimum, the restrictions "burden no more speech than necessary to serve a significant government interest." *Madsen*, 114 S. Ct. at 2525. The *Madsen* Court explained further, *id.* at 2526, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968):

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

*Carroll*, 393 U.S. at 183-84. *See Madsen*, 114 S. Ct. at 2526.[14]

In the present case, the speech-restrictive portions of the preliminary injunction are subject to the traditional rule of prior restraints, rather than the exceptional *Madsen* category of content-neutral injunctions which restrict speech only "incidentally," in a limited manner, in response to prior unlawful conduct. *Madsen*, 114 S. Ct. at 2524 n.2. In particular, the "cease and desist" provision imposes a licensing scheme on

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14. *Carroll* was a prior restraint case. 393 U.S. at 181. By simultaneously invoking *Carroll* while claiming not to apply prior restraint analysis, the *Madsen* opinion is internally inconsistent.

speech – a classic prior restraint – regardless of whether the injunction as a whole fits inside or outside of the *Madsen* exception to the prior restraint doctrine. *Infra* § V(C).

But regardless of whether the correct standard of review here is prior restraint analysis or *Madsen* scrutiny, the injunctive restrictions at issue are unconstitutional.

B. The Speech-Restrictive Injunctive Provisions Here Fail the Prior Restraint Test.

"Any prior restraint on expression comes to this Court with a `heavy presumption' against its constitutional validity." *Keefe*, 402 U.S. at 419 (and cases cited). "Respondent[s] thus carr[y] a heavy burden of showing justification for the imposition of such a restraint." *Id.* "In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Respondents have failed to carry this heavy burden.

The speech of pro-life picketers and sidewalk counselors can entail a broad variety of expressions – everything from silent witness, to polite offers of information, to urgent entreaties, to pointed criticisms, to emotional exclamations. Such speech, however characterized, cannot be relegated wholesale to the forbidden categories of obscenity or "fighting words." On the contrary, pro-life speech "is entitled to the fullest possible measure of constitutional protection," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing, as example, "Abortion is Murder"). Hence, no exception to the prior restraint doctrine can justify the injunctive restrictions at



issue.

Moreover, this case presents no extraordinary, overriding need to suppress speech. In *Keefe*, this Court held that a private citizen's allegations of coercion, intimidation, and invasion of residential privacy were insufficient to justify a prior restraint. In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), this Court found that a private citizen's competing constitutional right to a fair trial under the Sixth Amendment was insufficient to justify a prior restraint. In *New York Times v. United States*, 403 U.S. 713 (1971), this Court held that even national security interests fell short of justifying a prior restraint. *A fortiori*, the prior restraint in this case – which seeks only to prevent alleged "harassment" – is plainly unconstitutional.

In the context of protected expressive activities, such as picketing, leafletting, and pure verbal communication, a court may "restrain *only unlawful conduct* and persons responsible for conduct of that character." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982) (emphasis added).[15] In short,

An order issued in the area of First Amendment rights

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15. In *Claiborne Hardware*, this Court reviewed a state court order imposing damages and an injunction against numerous civil rights activists. This Court held that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916-17 (citation omitted). "For the same reasons," this Court continued, "the permanent injunction" imposed against the activists "must be dissolved." *Id.* at 924 n.67. This Court declared that the lower court, on remand, "may wish to vacate the entire injunction" if the facts indicated that the order was "no longer necessary"; at a minimum, however, "the injunction *must* be modified to restrain *only unlawful conduct* and the persons responsible for conduct of that character," *id.* (emphasis added).

> must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

*Carroll*, 393 U.S. at 183-84. It follows that injunctive provisions which restrict peaceful, public expression in traditional public forum property violate the doctrine of prior restraints. Rather than limit itself to unlawful activities, such as blockading or trespass, the injunction in this case bans a broad range of peaceful expressive activity, including picketing, leafletting, and even mere conversation.

Therefore the speech-restrictive portions of the preliminary injunction, i.e., the floating bubble and fixed buffer zones and the "cease and desist" requirement, are unconstitutional prior restraints on speech.

### C. *Madsen* Establishes Demanding Constitutional Analysis for Speech-Restrictive Injunctions.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court recognized a limited exception to the prior restraint doctrine.

In *Madsen*, this Court confronted a "36-foot buffer zone around the clinic entrances and driveway," 114 S. Ct. at 2530. This Court upheld the zone in part and struck it down in part. *Id.* Insofar as this Court upheld the 36-foot zone, its ruling reflected the highly unusual factual circumstances at the abortion facility in Melbourne, Florida:

- the *Madsen* defendants had "repeatedly" interfered with the physical access of patients and staff, *id.* at 2526;
- the physical layout of the area produced "narrow confines" for traffic, *id.* at 2527;



- a previous, narrower injunction failed to protect access, *id.* at 2527-28.

Especially important to this Court in *Madsen* was the factual finding, which the *Madsen* defendants did not properly challenge on appeal, that the "presence" of protesters "standing, marching, and demonstrating" near the entrance "interfered with ingress and egress," *id.* at 2527-28. As a matter of *fact*, therefore, allowing the *Madsen* defendants to remain on the adjacent sidewalk was "not a viable option," *id.* at 2527.

By simultaneously striking down the 36-foot zone as applied to adjacent private property, this Court in *Madsen* established important outer limits to the use of "buffer zones": "Absent evidence that [defendants] . . . have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, [a] buffer zone fails to serve the significant government interests" at stake. *Id.* at 2528.

The *in banc* Second Circuit in the present case rejected two crucial factors in the *Madsen* analysis: first, the need for initial resort to a narrower, nonspeech-restrictive injunction before imposing broader restrictions; and second, the need for a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure. These factors are *not* mere incidental features of *Madsen*; rather, they represent essential constitutional predicates.

*Madsen* holds that speech-restrictive *injunctions* trigger a stricter standard of review than speech-restrictive *ordinances*. 114 S. Ct. at 2524-26. Yet *Madsen* upheld a ban on even peaceful demonstrating on an entire sidewalk. *Id.* at 2526-28. An ordinance or statute imposing such a ban would clearly violate

a vast array of this Court's precedents,[16] precedents which *Madsen* did not purport to overrule. Hence, the *Madsen* decision *must* depend upon the rather extraordinary factual circumstances this Court identified. Otherwise, it would follow from *Madsen* that courts could issue speech-restrictive injunctions virtually upon demand.[17] Furthermore, whereas *Madsen* sets a stricter standard for injunctions than for ordinances and statutes, if *Madsen* is not limited to the unusual facts of that case, it would follow *a fortiori* that ordinances or statutes imposing speech-free zones would pass constitutional muster.[18]

Misreading *Madsen* would distort that ruling into a large-scale amputation of this Court's First Amendment jurisprudence, as

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16. *E.g. Thornhill v. Alabama*, 310 U.S. 88 (1940) (ban on picketing outside premises of business unconstitutional); *United States v. Grace*, 461 U.S. 171 (1983) (ban on display of sign or banner on sidewalk outside Supreme Court unconstitutional). "In these quintessential public fora, the government may not prohibit all communicative activity." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

17. Some lower courts have done precisely this. *E.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 898 P.2d 402, 43 Cal. Rptr. 2d 88 (1995) (upholding, after remand in light of *Madsen*, injunction banishing all picketing and sidewalk counseling from the sidewalk adjacent to an abortion business even where access was not an issue), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 6, 1995) (No. 95-576).

18. Regrettably, lower courts have misread *Madsen* in precisely this manner. *E.g., Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995), *cert. denied*, No. 95SC593 (Colo. Feb. 26, 1996), *petition for cert. filed sub nom. Hill v. Colorado*, 64 U.S.L.W. _ (U.S. May ___, 1996) (No. 95-___); *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 5, 1996) (No. 95-1415).



reflected in the decision below. By contrast, taking *Madsen* at its word, and in the context of the body of this Court's precedents, the proper constitutional review of an injunction entails the following searching analysis:

1. Have the plaintiffs satisfied the requirements for equitable relief in general, i.e., shown irreparable harm and a likelihood of success of the merits upon one or more claims? *E.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Madsen*, 114 S. Ct. at 2524 n.3.

2. Is the injunctive remedy tailored to the particular causes of action for which the plaintiffs have shown a likelihood of success? *Madsen*, 114 S. Ct. at 2523 ("the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public").

3. Is the injunction limited to those defendants who threaten the irreparable harm in question? *Id.* at 2524 n.3; *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 924 n.67; *Rizzo v. Goode*, 423 U.S. 362, 375 (1976); *Memphis v. Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8 (1978).

4. Is the injunction sufficiently definite to satisfy Rule 65(d)? *See* Rule 65(d), Fed. R. Civ. P. ("Every order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail . . . the act or acts sought to be restrained").

If the injunction restricts only conduct, not speech, and the answer to all of the preceding questions is affirmative, the analysis ends here and the injunction is upheld. If the injunction imposes restrictions on expressive activity, however, the analysis proceeds with the following:

5. Does the injunction fall within the *Madsen* exception to the prior restraint doctrine (i.e., the order only restricts speech

*indirectly*, only restricts expressive activity *because of prior unlawful conduct*, and only imposes *content-neutral* restrictions)? *Madsen*, 114 S. Ct. at 2524 n.2.

6. Do the restrictions on expressive activity represent a "last resort," rather than a "first resort," because a narrower injunction has failed? *Id.* at 2527-28.

7. Have the enjoined parties engaged in pervasive unlawful conduct making restrictions on expressive activity the only viable option? *Id.*

8. Are there overriding government interests (in addition to the necessary private interests) that support the government action entailed in a court's imposition of the particular restrictions at issue? *Id.* at 2525-26.

9. Are the terms of the injunction narrowly tailored to both the private interests and the government interests so as to further these interests while burden burdening no more speech than necessary? *Id.* at 2523, 2525.

10. Are the terms of the injunction sufficiently clear to avoid unconstitutional vagueness? *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Again, if the answers to all of these inquiries is affirmative, the analysis ends and the injunction is upheld. If, on the contrary, the answer to any of the foregoing questions is negative, the injunction violates the First Amendment and the offending terms must be modified or deleted.

By no means does *Madsen* grant courts *carte blanche* authority to create injunctive "floating speech-free zones" and other restrictions on speech at every demonstration site. On the contrary, only application of the thorough analysis set forth above comports with both *Madsen* and the entirety of this Court's previous decisions and affords the respect due the



freedom of speech in this nation. As demonstrated below, the speech-free zones and the "cease-and-desist" provision fail to satisfy this governing standard.

## IV. THE FIFTEEN-FOOT ZONES AND THE CEASE-AND-DESIST PROVISION FAIL FIRST AMENDMENT SCRUTINY FOR WANT OF A SUPPORTING INTEREST.

The preliminary injunctive restrictions at issue must fail for want of underlying private interests.

To obtain a preliminary injunction, a plaintiff must demonstrate, *inter alia*, a likelihood of success on the merits of one or more underlying claims. *E.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). These underlying claims then supply the "legs" on which the injunction must "stand" in the face of First Amendment scrutiny. *Madsen*, 114 S. Ct. at 2523 ("the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public"), 2525 ("injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs") (internal quotation marks and citation omitted), 2526 (injunction must be written in "the narrowest terms that will accomplish the pin-pointed objective") (internal quotation marks and citation omitted).

In the present case, the district court initially held that respondents were likely to prevail on three of their claims: (1) the federal "deprivation" claim under 42 U.S.C. § 1985(3); (2) a state statutory antidiscrimination claim analogous to § 1985(3); and, (3) a state trespass claim. 799 F. Supp. at 1429-32.

This Court subsequently rejected the legal underpinnings of respondents' § 1985(3) claim. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In the wake of *Bray*, the district court in the present case dismissed respondents' §

1985(3) claim, thereby removing that cause of action as a possible supporting basis for the injunction. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 828 F. Supp. 1018 (W.D.N.Y. 1993) (Br. App. 1a).

The district court's ruling that respondents were likely to prevail on their state antidiscrimination claim rested squarely upon the court's ruling regarding § 1985(3). *See* 799 F. Supp. at 1431 (success on state claim follows "by definition" from success on § 1985(3) claim). Thus, the district court's holding regarding this claim topples "by definition" with the § 1985(3) claim.

The only other claim for which the district court held respondents likely to prevail was respondents' state trespass claim. Thus, that claim provides the sole equitable and constitutional basis for the current preliminary injunction.

The preliminary injunction already enjoins all trespassing at abortion facilities. Pet. App. A-183. Plainly, a trespass claim cannot also support restrictions on *nontrespassory* activity, such as "speech-free zones" or a "cease and desist" order in public forum property. Absent an underlying foundation in the lawsuit, these speech-restrictive terms of the injunction become totally gratuitous and, hence, violative of the First Amendment under *any* standard of review.[19]

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19. The district court already acknowledged that "if plaintiffs file an amended complaint setting forth a [new] § 1985(3) claim, the Court will likely be required to hold a supplemental hearing to reevaluate plaintiffs' ability, after *Bray*, to establish, by a preponderance of the evidence, their likelihood of success on [that claim] . . . ." 828 F. Supp. at 1026. The district court perceived no immediate need to undertake this task, however, because the court had grounded the preliminary injunction not only on § 1985(3) but also on two state-law claims. *Id.* at 1026 n.4. This ignores the possibility that "even though the District Court had jurisdiction over state-law claims, judgment on those claims alone cannot support the injunction that was entered." *Bray*, 506 U.S. at 285. As noted in the text, the probability of respondents' success on one of these claims (antidiscrimination) rested solely on their failed § 1985(3) claim. And the other state-law claim – trespass – cannot support restrictions against *nontrespassory* expressive activity.



The Second Circuit declined to address the question whether the injunctive restrictions failed for want of corresponding underlying causes of action. 67 F.3d at 367 (panel); 67 F.3d at 386 (*in banc*). The court reasoned that this was a question of state law, and, because petitioners had not yet raised the state law issue in the district court, that court should be the first to address it. *Id.*

The approach of the Second Circuit is fundamentally flawed. The want of underlying meritorious claims supporting restrictions on speech *is itself a factor in the constitutional review.* First Amendment analysis requires assessment of the countervailing interests; if there simply are *no bases* upon which to rest the challenged injunctive restrictions on speech, those restrictions must fall. *Cf. Madsen*, 114 S. Ct. at 2523, 2525; *Texas v. Johnson*, 491 U.S. 397, 403-04 (1989) (when assessing whether an asserted interest justifies a restriction on speech, one "possibility is that the . . . asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture").[20]

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20. Even if the lack of underlying causes of action were purely a question of state law, the Second Circuit ought to have reached the issue. This Court has long counseled that courts should "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it," *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491, 501 (1985) (internal quotation marks and citations omitted). By overlooking the threshold lack of a supporting cause of action and proceeding to the constitutional merits, the Second Circuit turned the established adjudicative order upside down.

An injunctive restriction cannot be *necessary* where the party seeking the relief is not likely to prevail on any claim pertinent to that restriction. The restrictions on nontrepassory expressive activity at issue here are unconstitutional for want of corresponding private interests.

## V. THE CEASE-AND-DESIST PROVISION VIOLATES THE FIRST AMENDMENT.

### A. The *Madsen* Decision Compels the Invalidation of the "Cease and Desist" Provision.

In *Madsen*, this Court struck down as unconstitutional an injunctive provision virtually identical to the "cease and desist" provision at issue here. *Madsen* was eminently correct in so ruling, and there is no reason to reach a different result here.

The "no approach" restriction in *Madsen* enjoined the *Madsen* defendants:

> At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [defendants]. In the event of such invitation, the [defendants] may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as sidewalk counseling, that person shall have the absolute right to leave or walk away and the [defendants] shall not accompany such person, encircle,

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The nonconstitutional aspects of this error, namely, the absence of an essential element of equitable relief, is plain and evident on the record. Hence, the Court has the discretion to decide the case on this basis as well. *See* Rule 24.1(a).



> surround, harass, threaten, or physically or verbally abuse those individuals who choose not to communicate with them.

114 S. Ct. at 2532 n.3 (quoted in opinion of STEVENS, J., concurring and dissenting). This injunctive provision applied to *all* communications, however peaceful. Further, this restriction made the speakers' right to communicate dependent upon the consent of the audience. This Court held that these features doomed the *Madsen* "no approach" provision:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (*i.e.*, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. . . . The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

*Id.* at 2529 (internal quotation marks, citation, and footnote omitted; emphasis in original).

The "cease and desist" provision in the instant case is likewise unconstitutional, and for the same reasons, among others. This provision outlaws *all* "disinvited" communications, "regardless of how peaceful." The "cease and desist" provision, like the "no approach" zone in *Madsen*, creates an "audience veto" by

imposing a "consent requirement" upon the speech and handbilling of sidewalk counselors.

These obvious similarities should suffice to dispose of this provision. Yet some lower courts – like the Second Circuit in this case – have refused to follow *Madsen* on this very point, claiming instead to have found some purported basis for distinguishing *Madsen*.[21] Such efforts to nullify *Madsen*'s clear holding are specious.

The Oakes opinion below emphasized a difference in the way the "no approach" zone in *Madsen* worked. In *Madsen*, sidewalk counselors could not approach *unless invited*, whereas in the present case sidewalk counselors can approach *until disinvited*. 67 F.3d at 390. This distinction is irrelevant.

First, this distinction does not touch upon the rationale *Madsen* gave for its holding. The no invitation/disinvitation distinction does not alter the crucial fact that the ban applies to *all* communication, however peaceful. Nor does this distinction alter the reality that in both cases, the speakers' freedom to communicate rests at the mercy – the consent – of the audience.

Second, the distinction between denial of consent and revocation of consent is legally insubstantial. This Court rejected any supposed difference of this kind long ago:

> To say that he who is free to *withhold* at will the privilege of publication exercises a power of censorship prohibited by the Constitution, but that he who has unrestricted

21. *E.g.*, *Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (U.S. Mar. 5, 1996) (No. 95-1415); *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995), *cert. denied*, No. 95SC593 (Colo. Feb. 26, 1996), *petition for cert. filed sub nom. Hill v. Colorado*, 64 U.S.L.W. __ (U.S. May __, 1996) (No. 95-__).



> power to *withdraw* the privilege does not, would be to ignore history and deny the teachings of experience, as well as to perpetuate the evils at which the First Amendment was aimed.

*Jones v. City of Opelika*, 316 U.S. 584 (1942) (emphasis added) (Stone, C.J., dissenting), *adopted on rehearing as opinion of the Court*, *Jones v. City of Opelika*, 319 U.S. 103 (1943) (per curiam). This Court rejected the argument that it made any difference whether permission was *withheld* or *revoked*, declaring that the freedom of speech "cannot rightly be defeated by so transparent a subterfuge," 316 U.S. at 601.[22]

Third, the difference between withholding consent and withdrawing consent is of little practical significance in the context of this case. The individual whom a sidewalk counselor approaches can cut off the counselor's communication before it begins, apparently with a mere word or gesture. The goading of hostile abortion escorts or the "poisoning of the well" toward sidewalk counselors by abortion business representatives could easily make this scenario the norm. Thus, the first or second word out of the sidewalk counselor's mouth may constitute contempt of the injunction.

The "cease and desist" provision, whether formulated to depend on *withholding* of consent or on *revocation* of consent,

22. In *Jones*, it was a governmental agent who had the "unrestrained and unreviewable discretion," *id.* at 600, to revoke permission to speak. That the present case involves the consent of a private actor makes no difference. Here, as in *Madsen*, it is the government that *enforces* the private actor's "veto" by contempt of court. Thus, while a private party's exclamation "Shut up!" itself implicates no First Amendment concerns, when a federal judge stands behind that exclamation with governmental enforcement powers, that governmental action must undergo constitutional scrutiny.

plainly runs afoul of *Madsen*'s square holding.

B. The "Cease and Desist" Provision Imposes an "Audience Veto."

This Court has long condemned "audience veto" provisions. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob") (footnote and citations omitted). "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., joined by Blackmun, O'CONNOR, and STEVENS, JJ., concurring in the judgment). "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 118 (1991) (internal quotation marks and citations omitted). *Accord Madsen*, 114 S. Ct. at 2529 (overturning injunctive ban on display of "images observable inside abortion facility; "[t]he only plausible reason a patient would be bothered . . . would be if the patient found the expression contained in such images disagreeable").

In *Simon & Schuster*, this Court went so far as to disclaim any legitimacy for a state "interest in limiting whatever anguish [crime] victims may suffer from reliving their victimization." 502 U.S. at 118. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that the First Amendment shielded Jehovah's Witnesses who accosted passersby and then attacked their religious beliefs. The desire to insulate abortion patrons from efforts to dissuade them cannot qualify as a legitimate justification for an audience veto provision. "The First Amendment inevitably requires people to put up with annoyance and uninvited



persuasion." *ISKCON v. Lee*, 505 U.S. 672, 712 n.* (1992) (SOUTER, J., joined by Blackmun and STEVENS, JJ., concurring and dissenting). "While a [sidewalk counselor] can be insistent, a pedestrian on the street . . . can simply walk away or walk on." *Id.* at 713. As this Court has squarely held, "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster*, 502 U.S. at 118 (internal quotation marks and citations omitted).

The district court in this case already enjoined obstructive conduct, physically abusing, grabbing, touching, pushing, shoving, or crowding persons coming or going at abortion facilities. Pet. App. A-183 to A-184. By going further and subjecting peaceful communication in public fora to the veto power of the passing auditor or viewer, the district court improperly sliced into the First Amendment.

C. The "Cease and Desist" Provision Imposes an Unconstitutional Licensing Scheme on Speech.

This Court has repeatedly condemned laws which subject expressive activity in public places to the unbridled discretion of a licensor. *E.g., Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Lovell v. Griffin*, 303 U.S. 444 (1938). Such laws impose an impermissible prior restraint on speech. *Forsyth County*, 505 U.S. at 130. Yet the "cease and desist" provision does precisely that: the injunction confers wholly discretionary authority upon staff and clients of abortion businesses, backed by the federal contempt power, to expel any unwanted speakers from a circle fifteen feet in radius. This "consent" scheme stifles any speech that "may strike at

prejudice and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Furthermore, "the mere existence of the licensor's unfettered discretion . . . intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133 (footnote omitted). In the same way, the First Amendment prohibits the government from deputizing private citizens as unbridled censors of speech in public fora. Government "may not empower its licensing officials [– here, `anyone or any group of persons,' Pet. App. A-184 –] to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions . . . ." *Shuttlesworth*, 394 U.S. 147, 153 (1969).

D. The "Cease and Desist" Provision is Unconstitutionally Vague.

As modified by the *in banc* Second Circuit, the "cease and desist" provision operates whenever "anyone or any group of persons" being counseled, Pet. App. A-184, "indicates, either verbally or non-verbally, that they do not wish to be counseled," 67 F.3d at 391. This restriction is hopelessly vague.

How does a "group of persons" indicate something? If a woman continues to listen while her companion or an escort yells "Back off!" may the counselors speak to the woman? *See* 67 F.3d at 391 n.5 (declining to decide this). More practically, what counts as a "verbal and nonverbal indication" of a desire not to be counseled? Respondents' counsel thought the obligation triggered "by gestures, facial expressions, *a companion saying no*," dkt. 65, at 1322 (Tr. of 2/14/91)



(emphasis added), by saying "leave me alone or words to that effect, or *gestures which could be interpreted to comport with the word leave me alone*," *id.* at 1323 (emphasis added), by "a shaking of a head or walking away," dkt. 88b, at 1336 (Tr. of 3/26/91), or by "any type of speech or body act which would indicate" a desire not to be counseled, *id.* at 1337. Does merely continuing to walk to or from the abortion facility count as wanting "to leave, or walk away," and therefore qualify as a nonverbal "indication" that the counselor must cease and desist? The preliminary injunction seems to contemplate this. Pet. App. A-184. The district court interpreted a wave of the hand, and merely holding up a hand, as sufficient when holding petitioner Rev. Schenck in contempt for failure to cease and desist. JA 133. What about grunts, skeptical looks, or the failure to make eye contact? The range of ambiguous nonverbal human signals is limitless. What if the person counseled is willing to hear out one counselor but not another? According to the district court, a rejection of one counselor "is applicable to all `sidewalk counselors.'" JA 117.

This Court has warned, in the free speech context, of the "possibility of abuse where convictions . . . frequently turn on the resolution of a direct conflict of testimony as to who said what." *City of Houston v. Hill*, 482 U.S. 451, 454 n.2 (1987) (internal quotation marks and citation omitted). In the present case, the injunction multiplies the problem by requiring proof of who *meant* what by a limitless variety of verbal or nonverbal signals. The cease and desist provision literally makes a charade of the freedom of speech.

E. The Captive Audience Doctrine is Inapplicable.

The Second Circuit sought to justify the "cease and desist" provision under the "captive audience" doctrine. 67 F.3d at 392. Such faulty reasoning threatens the First Amendment. The

captive audience doctrine does not apply to auditors and viewers who are free to come and go in a public forum.

The captive audience doctrine does not strip constitutional protection from all unwelcome speech. On the contrary:

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from public dialogue . . . . we have at the same time consistently stressed that we are often "captives" outside the sanctuary of the home and subject to objectionable speech.

*Cohen v. California*, 403 U.S. 15, 21 (1971) (internal quotation marks and citations omitted). Thus, this doctrine applies "only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (citations and footnotes omitted). "These situations are different from the traditional settings [i.e., public fora] where First Amendment values inalterably prevail." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality). "Nothing in the Constitution compels us to *listen* to or *view* any unwanted communication, whatever its merit," *Rowan v. United States Post Office*, 397 U.S. 728, 737 (1970); nevertheless, the Constitution does not permit a disgruntled auditor or viewer to "silence dissidents simply as a matter of personal predilections," *Cohen*, 403 U.S. at 21.

People are regularly "captives" of whatever expressive activity happens to take place where they are obligated to be. The witness, party, or attorney who must attend a court hearing, *cf. Cohen v. California*, 403 U.S. 15 (1971); *United States v. Grace*, 461 U.S. 171 (1983), the student who must go to school, *cf. Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969);



*Grayned v. City of Rockford*, 408 U.S. 104 (1972), the citizen with business at a government building, *cf. Edwards v. South Carolina*, 372 U.S. 229 (1963), and most definitely the employee desiring to keep his job in a particular store, *cf. Thornhill v. Alabama*, 310 U.S. 88 (1940); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) – each of these has no choice but to attend the place in question. But the "captive audience" doctrine does not abrogate the First Amendment in these places, as the above-cited cases illustrate.

As the original panel majority below explained, "Although the prospective counselee need not *listen* to the counselor, she does not have the right to stop the counselor's communication, absent any evidence that the communication is independently proscribable," 67 F.3d at 371 (citing *Madsen*) (emphasis in original). "[H]owever insistent the sidewalk counselor may be, the counselee on the public street or sidewalk can escape the unwanted message simply by continuing to walk towards and entering the clinic." *P.C. Network IV*, 67 F.3d at 406 (Meskill, J., dissenting). As *Madsen* forcefully reiterated, "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." 114 S. Ct. at 2529 (internal quotation marks and citations omitted).

Thus, while protection of a person "captive" in his own home might justify an ordinance banning picketing confined to the front of that home, *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988), concern for shielding even a resident cannot justify bans on leafletting on residential streets, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971), or marching past that same house, *Gregory v. City of Chicago*, 394 U.S. 111 (1969). And while concern for "the patient held `captive' by medical

circumstance," *Madsen*, 114 S. Ct. at 2526, may justify restrictions on noise audible to that patient sitting *inside a facility*, *id.* at 2528, no such concern can justify barring speakers from approaching and addressing that very same patient *on a public way*, *id.* at 2529.

Sidewalk counseling can be (and generally is) completely peaceful. Indeed, in this case the "cease and desist" provision only applies to "conversation of a nonthreatening nature," Pet. App. A-184, because only such counseling is permitted within the fifteen-foot zones, *id.* Thus, the "cease and desist" provision operates exclusively to subject *peaceful conversation* to an audience veto. As Judge Altimari pointed out below, this represents "an unprecedented and unwarranted incursion on freedom of speech." 67 F.3d at 410 (dissent).

## VI. THE FIXED AND FLOATING BUBBLE ZONES VIOLATE THE FIRST AMENDMENT.

The preliminary injunction constructs invisible fifteen-foot speech-free zones which prohibit "demonstrating" within fifteen feet of any "doorways or doorway entrances, parking lot entrances, driveways and driveway entrances" of any abortion facilities in the Western District of New York as well as within fifteen feet of "any person or vehicle seeking access to or leaving" any abortion facility in the Western District of New York ("floating bubble zones"). Pet. App. A-183. These speech-free zones violate the First Amendment.

As discussed above, *Madsen* held that a *fixed* buffer zone could be a valid remedial measure if the factual circumstances were so extreme as to warrant such relief. *Madsen* did *not* approve of "floating" bubble zones; on the contrary, this Court invalidated a similar "no approach" restriction that effectively created floating bubble zones around patients within 300 feet of an abortion facility. 114 S. Ct. at 2529. *Supra* § V(A). In any



event, the speech-free zones at issue here do not pass muster under the stringent *Madsen* standard.

First, no extraordinary record of pervasive lawlessness exists in this case. The district court found that the demonstrations were "usually peaceful in nature," 799 F. Supp. at 1423, and that even the so-called "constructive blockades" were *not* "physically blocking patient access," *id.* at 1424; *see also id.* at 1424 n.5. A clear majority of the *in banc* Second Circuit forthrightly agreed that this case does not present the record of lawlessness that this Court faced in *Madsen*. 67 F.3d at 396 (Winter opinion – ten judges), 400-01 (Meskill dissent – two judges). But instead of reversing the zones on this basis, the Second Circuit dismissed the need for supporting facts: "an extensive record of coercion or obstruction is not required" to justify speech-free zones, the court held. *Id.* at 396 (Winter opinion). With a stroke of the pen, the Second Circuit thereby severed the *Madsen* result from its exceptional factual moorings, distorting that decision into a *carte blanche* authority for erecting buffer zones to protect "[t]he timid" from the "chilling effect" of demonstrations. 67 F.3d at 396 (Winter opinion). This is, of course, the First Amendment turned upside down. "If absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only `free speech' would consist of platitudes. That kind of speech does not need constitutional protection." *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987) (editing marks, quotation marks, and citation omitted).

Second, the district court imposed speech-free zones as a *first* resort, not as a response to the failure of a narrower injunction. *Compare Madsen*, 114 S. Ct. at 2527-28. The TRO imposed floating bubble zones just days after respondents filed suit. JA 23. There was no initial effort to secure access with a less restrictive, speech-protective injunction. The district court then

added the fixed buffer zones in the preliminary injunction without identifying any need for this expanded restriction.

Third, the speech-free zones prohibit far more speech than necessary. In *Madsen*, this Court ruled that speech-restrictive injunctions trigger a stricter standard of review that the "time, place, and manner" analysis governing ordinances and statutes of general applicability. 114 S. Ct. at 2524-26. Logically, then, an injunctive restriction that fails the "narrow tailoring" requirement of time, place, and manner analysis, *id.* at 2524, *ipso facto* violates the "more stringent" *Madsen* requirement, *id.*, that the injunction "burden no more speech than necessary," *id.* at 2525. A statute or ordinance "is narrowly tailored if it targets and eliminates no more than the exact source of the `evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted). Consequently, an anti-speech injunction must be at least as tightly focused in its proscriptions.

The fixed and floating fifteen-foot speech-free zones at issue here reflect no such narrow tailoring. These zones do not "aim specifically at evils within the allowable areas of State control but, on the contrary, sweep[] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940). "Without interfering with normal . . . activities, daytime picketing and handbilling on public grounds . . . can effectively publicize" the speakers' message. *Grayned*, 408 U.S. at 118-19. Yet the zones prohibit even "such sacrosanct First Amendment conduct as holding a placard containing an antiabortion message, passive leafletting or handbilling, silent picketing and even the mere voicing of protest." 67 F.3d at 401 (Meskill, J., dissenting). Such a broad ban is not "*necessary* for the maintenance of peace and tranquility on the public sidewalks surrounding the building,"



*United States v. Grace*, 461 U.S. 171, 182 (1983) (emphasis added); hence, these restrictions violate *Madsen*'s narrow tailoring requirement. Other parts of the preliminary injunction already prohibit all trespassing, obstructive conduct, and disruptive noise, Pet. App. A-183 to A-184; all that the speech-free zones add are a ban on peaceful, nonobstructive demonstrations on public sidewalks or rights of way. Governmental restrictions on expressive activity "can find constitutional justification only by dealing with the abuse [of rights]. The rights themselves must not be curtailed." *DeJonge v. Oregon*, 299 U.S. 352, 364 (1931).

Fourth, the ban on "demonstrating" in the fixed and floating speech-free zones is unconstitutionally vague. Petitioners cannot know with any certainty what the term "demonstrating" includes. The dissent to the Second Circuit's *in banc* decision described this term as including "the entire universe of expressive activity," 67 F.3d at 401, and the majority opinions did not question this interpretation. If this view is correct, the buffer and bubble zones are truly "First Amendment free zones," *cf. Board of Airport Comm'rs v. Jews for Jesus, Inc.* 482 U.S. 569, 574 (1987). On the other hand, if "demonstrating" includes some subset of the universe of expression, then the contours of this term are vague.

Some activities clearly constitute demonstrating, *e.g.*, picketing or holding a rally. The district court construed sidewalk counseling – leafletting and conversation – to be a "form of demonstrating," Pet. App. A-183. Respondents interpret demonstrating to include scolding abortion staff for their work. Pet. App. A-208 (exhibit to contempt request). What about a silent vigil? Wearing a pro-life tee-shirt or button? Praying the rosary? These are not abstract hypothetical questions–individuals engaging in "demonstrating" have to stay

fifteen feet from facility entrances and cease their "demonstrating" whenever someone coming from or going to the facility (i.e., radiating a floating bubble), passes within fifteen feet. As with the other speech-restrictive portions of the preliminary injunction, the result is that the exercise of free speech becomes analogous to walking through a mine field. If the goal is to crush pro-life expression at abortion facilities, one could hardly devise a better means.

The fixed and floating speech-free zones suffer from additional constitutional defects specific to their respective prohibitions.

For their part, the fixed buffer zones reflect no consideration whatsoever of geographical features. *Compare Madsen*, 114 S. Ct. at 2527 (noting importance of specific physical setting). These fifteen-foot zones represent an arbitrary, one-size-fits-all approach to at least a half dozen different abortion facilities. JA 35-36. Rather than tailor an order to a particular location,[23] as in *Madsen*, the district court issued a blanket "solution" for the entire Western District of New York. Pet. App. A-183. If *this* order is constitutional, site analysis becomes a farce and fifteen-foot "no demonstration" zones become standard fare at *all* picketed facilities.

The floating zones, meanwhile, are tantamount to a total ban on picketing and leafletting anywhere in the vicinity of an abortion facility. A person walking down a sidewalk en route to or leaving an abortion facility "emanates" a "zone of silence"

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23. The facilities here present a variety of physical layouts. The Buffalo Gyn Womenservices facility at 1241 Main Street, for example, shares a building with, *inter alia*, a post office. Dkt. 81 at 189 (Tr. 3/7/91). The Erie Medical Center on 50 High Street, meanwhile, occupies the fifth floor of a multi-tenant facility which also houses, *inter alia*, a restaurant and a pharmacy. *Id.* at 237-38.



extending fifteen feet in radius. In the face of this "bubble zone . . . which amorphously wafts along immuring any individual coming or going from the clinic," 67 F.3d at 410 (Altimari, J., dissenting), picketers, leafletters, and anyone else who could be characterized as "demonstrating" must flee from approaching pedestrians on pain of contempt. In effect, a floating bubble zone bulldozes all pro-life speech off the sidewalks.[24] If a hapless picketer trying to stay fifteen feet ahead of one pedestrian should encounter another coming in the opposite direction, the picketer is trapped without any escape route from contempt. If a placard-carrying individual should fail to pay close attention in all directions, a "speech-free bulldozer" may run him over before he has time to conceal his sign. The only truly safe way to dodge these "rolling blackouts" on speech is to stay home.

The floating bubble zones are also unconstitutionally vague, even aside from the vagueness of the term "demonstrating" addressed above. There is simply no way petitioners can know with any degree of certainty who is a mere passerby (i.e., who carries no zone) and who is a "person . . . seeking access to or leaving [abortion] facilities" (i.e., who carries a fifteen-foot zone). Nor can petitioners know where the floating zones do and do not apply. The district court "clarified" the geographical scope of the TRO by stating that the injunction "is directed to activities *at* the sites chosen for demonstrations," JA 29 (emphasis added), but that is no clarification at all: *wherever* a person is "demonstrating" will be by definition the site that

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24. It is of course rare that a sidewalk will be more than fifteen feet wide. Even in the case of such a hypothetically capacious promenade, those maneuvering their "speech-free bulldozer bubbles" down the path could still crush out pro-life speech by simply walking down the center of even a thirty-foot wide sidewalk.

person has chosen for a demonstration. The *in banc* Second Circuit refused to remedy this vagueness:

> We do not address the issue . . . of how far from a clinic a floating buffer zone may reach to protect a person "seeking access to or leaving" the clinic. This is exactly the type of issue that is best left to case-by-case adjudication by the district court. We are confident that the district court will apply a reasonable geographic scope to the phrase "seeking access to or leaving."

67 F.3d at 389 n.4. Obviously, the absence of clear geographical boundaries to the injunction puts petitioners to the untenable choice of either risking unpredictable contempt judgments or ceasing to exercise free speech. *Grayned*, 269 U.S. at 108-09.

The mobile fifteen-foot zones powerfully chill speech. Petitioners are not state-of-the-art robots outfitted with optical devices that can precisely and instantaneously calculate a fifteen foot distance while moving. Whereas a spatial misjudgment brings with it a $10,000 penalty (or more), Pet. App. A-185, plus attorney fees, Pet. App. A-186, demonstrators are forced to maintain a still greater distance to avoid contempt.

In sum, the fixed and floating speech-free zones impose deeply chilling and flagrantly unconstitutional restrictions on free speech.

## CONCLUSION

This Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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May 17, 1996

# APPENDIX

PRO-CHOICE NETWORK OF WESTERN NEW YORK, Buffalo Gyn Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., P.C., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, Alexander Women's Group, Plaintiffs,

v.

PROJECT RESCUE WESTERN NEW YORK, Operation Rescue, Project Life of Rochester, Operation Rescue National, Friends to the Weary, Christian Activist Lifeline, Christians in Action of Rochester New York, Pro-Life Rescue Movement of Western New York, Rev. Paul Schenck, Rev. James L. Evans, Rev. Ted Cadwallader, Dwight Saunders, David Anderson, Jeffrey Baran, Brian Bayley, Bonnie Behn, Ronald Breymeier, Gilbert Certo, Scott Chadsey, Kim Day, Constance Debo, Mark Dent, Wayne Dent, Paul Diemert, Joan Giangreco, Delores Glaser, Carmelina Golba, Kevin Golba, Linda Hall, Nancy Hall, Thomas Hall, Rev. Daniel Hamlin, James Handyside, Pamela Huffnagle, Rev. Johnny Hunter, Donna Johanns, Eric Johns, Neal Kochis, Paulette Likoudis, Charles McGuire, Christopher Morrow, Annemarie Nice, Nicholas Pukalo, Carla Rainero, Thomas Riley, Patricia Ostrander, Linda Ross, Rev. Robert Schenck, David Smith, Linda Smith, Mark Sterlace, Joyce Strigel, Karen Swallow-Prior, Rev. Keith Tucci, Randall Terry, John Thomann, John Tomasello, Paul Waldmiller, Jr., Nancy Walker, Leonard Winter, Horace Wolcott, Gerald Crawford, David Long, John Doe(s) and Jane Doe(s), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to

engage in, the conduct complained of herein, Defendants.

No. 90-CV-1004A.
United States District Court,
W.D. New York.
July 30, 1993.

Glenn E. Murray, Lucinda Finley, Isabel Marcus, Buffalo, NY, for plaintiffs.

Laurence D. Behr, Buffalo, NY, for defendants.

DECISION AND ORDER

ARCARA, District Judge.

INTRODUCTION

Presently before the Court is defendants' motion to dismiss the fourth amended complaint and vacate the Court's February 14, 1992 preliminary injunction. The basis for defendants' motion is that dismissal of the federal claim under 42 U.S.C. § 1985(3) is compelled by the recent decision of the United States Supreme Court in *Bray v. Alexandria Women's Health Clinic*, — U.S. —, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), and without the federal claim, the Court is precluded from exercising pendent jurisdiction[1] over the remaining state-law claims, or in the alternative, should decline to do so in the interests of judicial economy, convenience, fairness and comity. For the reasons set forth below, the Court grants

1. *See infra* note 7.



defendants' motion to dismiss as to plaintiffs' § 1985(3) claim only, with leave to plaintiffs to amend their complaint; denies defendants' motion relative to the continued exercise of pendent jurisdiction over plaintiffs' state-law claims; and denies defendants' motion to vacate the injunction.

PROCEDURAL BACKGROUND

On February 14, 1992, this Court rendered a Decision and Order granting plaintiffs' motion for a preliminary injunction. *Pro-Choice Network of W. New York v. Project Rescue W. New York*, 799 F.Supp. 1417 (W.D.N.Y. 1992). The injunction was based on a finding of irreparable harm and plaintiffs' likelihood of success on their 42 U.S.C. § 1985(3) claim and two state law claims: N.Y.Civ.Rights Law § 40-c, and New York State trespass law. *Id.* at 1429-32. The Court noted that the outcome of *Bray*, which was at the time pending before the Supreme Court, could require the Court to revisit its decision. *Id.* at 1422 n. 2.

On January 13, 1993, the Supreme Court decided *Bray*, holding that the complaint in that case failed to state a claim upon which relief could be granted under § 1985(3) for an alleged conspiracy to deprive women of their rights to interstate travel and to obtain an abortion. — U.S. —, 113 S.Ct. 753.

On January 20, 1993, defendants filed the instant motion to dismiss the complaint and vacate the injunction based on their interpretation of *Bray* that it forecloses the use of § 1985(3) in all abortion protest cases and further, that it is tantamount to an assertion that this Court never had subject matter jurisdiction over this action, and therefore has no

authority to continue to exercise jurisdiction over the state-law claims. Plaintiffs filed a memorandum of law in opposition to defendants' motion on February 12, 1993, and defendants filed a reply memorandum on March 12, 1993. Prior to oral argument on defendants' motion, the Second Circuit Court of Appeals interpreted the *Bray* decision in *Town of W. Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir.1993), leaving open the possibility that plaintiffs seeking to enjoin the activities of abortion protesters could, after *Bray*, state a federal claim under § 1985(3).

This Court heard oral argument on defendants' motion on May 5, 1993. At that time, defendants submitted a supplemental brief in support of their motion, which addressed *Town of W. Hartford*. The Court provided plaintiffs an opportunity to respond to that brief, and specifically to address the viability of their § 1985(3) claim after *Town of W. Hartford*. The last paper relative to this issue was filed May 26, 1993, and defendants' motion was deemed submitted.

DISCUSSION

Initially, defendants have not specified whether they are moving for dismissal for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), or failure to state a claim pursuant to Rule 12(b)(6). "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951).

> Where the complaint 'is so drawn as to seek recovery under the Constitution or laws of the United States,' the district court must entertain the suit unless the federal claim 'clearly appear to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous.'



*Spencer v. Casavilla*, 903 F.2d 171, 173 (2d Cir.1990) (quoting *Bell v. Hood*, 327 U.S. 678, 681, 682-83, 66 S.Ct. 773, 775, 776, 90 L.Ed. 939 (1946)). Defendants assert that *Bray* rendered plaintiffs' § 1985(3) claim so insubstantial that this Court no longer has jurisdiction even to decide whether to, in its discretion, continue to exercise pendent jurisdiction over the state-law claims. This is an argument that the Court lacks subject matter jurisdiction and that the complaint must be dismissed pursuant to Rule 12(b)(1). The Court, however, finds this argument without merit and contrary to the explicit holding in *Bray* that "[w]hile respondents' § 1985(3) causes of action fail, they were not, prior to our deciding of this case, 'wholly insubstantial and frivolous,' so as to deprive the District Court of jurisdiction." — U.S. at —, 113 S.Ct. at 768 (quoting *Bell*, 327 U.S. at 682-83, 66 S.Ct. at 776). Defendants' reliance on the phrase "prior to our deciding of this case" as meaning that after January 13, 1993, all such causes of action are frivolous even if asserted prior to that date, is a contortion of the plain meaning of the Court's holding.

The Second Circuit, when presented with a similar request to find the § 1985(3) claim insubstantial in *Town of W. Hartford*, cited the above language in *Bray* in summarily denying the request. 991 F.2d at 1048-49; *see also New York State NOW v. Terry*, 961 F.2d 390, 396 (2d Cir.1992) ("*Terry II*") (noting that even if Supreme Court reversed the Fourth

Circuit in *Bray*, that holding would be of little benefit to defendants unless Supreme Court also found that the federal question was, from the inception, wholly insubstantial and frivolous), *vacated, remanded sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic*, — U.S. —, 113 S.Ct. 1233, 122 L.Ed.2d 640 *reinstated*, 996 F.2d 1351 (2d Cir.1993); *NOW v. Operation Rescue*, 816 F.Supp. 729, 730 (D.D.C. 1993) (court rejected defendants' assertion that § 1985(3) claims were so insubstantial after *Bray* that it lacked subject- matter jurisdiction over the action, including the state-law claims); *United States v. Terry*, 815 F.Supp. 728, 730 n. 4 (S.D.N.Y. 1993) (noting that "[i]nasmuch as the Preliminary Injunction was issued prior to the *Bray* decision, and was not, therefore, based on claims that were, at the time, 'wholly insubstantial and frivolous,' this Court is not divested of subject-matter jurisdiction.").

Thus, the Court is not deprived of jurisdiction as a result of *Bray*, and must consider whether plaintiffs' § 1985(3) claim, as set forth in their fourth amended complaint, states a claim, after *Bray*, upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

> If dismissal for facial insubstantiality is avoided, further inquiry into the existence of federal question jurisdiction . . . turns on the existence of the underlying claim as pleaded. The existence of such a claim is of course a necessary predicate for the existence of federal jurisdiction over it. But if it is determined on this inquiry that jurisdiction fails because no such federal claim exists, the proper disposition is to dismiss on the merits for failure to state a claim rather than for a want of subject matter



> jurisdiction.

*Ridenour v. Andrews Fed. Credit Union*, 897 F.2d 715, 719 (4th Cir.1990) (citing *Bell*, 327 U.S. at 682, 66 S.Ct. at 776; *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 279, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 1977)); see also *Town of W. Hartford v. Operation Rescue*, 915 F.2d 92, 99-100 (2d Cir.1990); *Spencer*, 903 F.2d at 173.

I. *The Viability of Plaintiffs' Section 1985(3) Claim after Bray.*

In general, in order to prevail on a § 1985(3) claim, a plaintiff must prove that: (1) defendants engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; and (3) acted in furtherance of the conspiracy; (4) whereby a person is either injured in his or her person or property or deprived of any right or privilege of a citizen of the United States. *See New York State NOW v. Terry*, 886 F.2d 1339, 1358 (2d Cir.1989) ("*Terry I*") (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971)), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990).

The Supreme Court in *Bray* focused on two requirements: "(1) [a showing that] 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action,' [hereinafter "animus" requirement]; and (2) that the conspiracy 'aimed at interfering with rights' that are 'protected against private, as well as official, encroachment.' " [hereinafter "interference" requirement]. — U.S. at —, 113 S.Ct. at 758 (quoting *Griffin*, 403 U.S. at 102,

91 S.Ct. at 1798; *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833, 103 S.Ct. 3352, 3358, 77 L.Ed.2d 1049 (1983)).

A. *Plaintiffs' Fourth Amended Complaint*[2]

Plaintiffs' first cause of action sets forth a claim under § 1985(3), involving both the right to travel and the right to obtain an abortion. With respect to the class-based animus requirement, the fourth amended complaint ("complaint") alleges that defendants have conspired together for the purpose of denying women seeking abortions and other family planning services the equal protection of the laws and equal privileges and immunities under the law, and further, that defendants continue to be motivated by an invidiously discriminatory animus directed at women seeking to exercise their constitutional and legal right to choose abortions. Item No. 329, ¶ 130.

With respect to the right to travel, the complaint alleges that defendants do not accept decisions of the Supreme Court that the Constitution protects a woman's right to travel across state lines to obtain medical care including abortion, *id.* ¶ 84, and that defendants' activities have and continue to disrupt and prevent the delivery of all health care services to patients from Western New York, other parts of New York, Pennsylvania and Ohio. *See, e.g., id.* ¶¶ 94-104.

As to the right to an abortion, plaintiffs allege that

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2. Plaintiff's fourth amended complaint was filed on December 23, 1992. For the most part, it simply added defendants and updated the case's factual background.



defendants do not accept the decisions of the Supreme Court that the Constitution guarantees and protects a women's right to choose abortion and to carry out that decision, and that they intend to interfere with those rights of women attending the targeted clinics and providers. *Id.* ¶ 83.

B. *The Preliminary Injunction Decision and Order*

This Court in its Preliminary Injunction Decision and Order found that, with respect to the animus requirement:

> [i]t is clear under *Terry* that defendants have the requisite class-based animus. There is uncontroverted evidence that defendants are opposed to the constitutional right of a woman to choose to have an abortion and that the object of their "rescue" activities is to hinder or prevent women–a group that is a protected class under § 1985(3)–from exercising that right.

799 F.Supp. at 1429-30 (citing *Terry I*, 886 F.2d 1339).

With respect to the interference requirement, this Court found that plaintiffs had established, by a preponderance of the evidence, that defendants' conspiracy infringed both the right to interstate travel and the right to have an abortion.

> [P]laintiffs have presented uncontroverted evidence that defendants' "rescue" activities have infringed the right of women to travel interstate to obtain an abortion[,] . . . [and that] defendants specifically target . . . out-of-state patients because they are easily identifiable.

. . . . .

> [With respect to the right to choose to have an abortion,] there has been substantial uncontradicted evidence that defendants' activities are intended, and do in fact, prevent and hinder local police from protecting the right of women to choose to have an abortion . . . . Such action by private persons satisfies § 1985(3)'s "state involvement" requirement.
>
> Furthermore, it cannot be disputed that defendants' activities have the object of depriving women of their right to choose to have an abortion. *Id.* at 1430, 1431 (citations omitted).

Plaintiffs' § 1985(3) cause of action and the Court's findings in its preliminary injunction decision and order were based on then-controlling Second Circuit precedent with respect to the animus and interference requirements.

C. *The Animus and Interference Requirements after Bray.*

On January 13, 1993, the date of the Supreme Court's decision in *Bray*, "the judicial landscape of § 1985(3) was radically altered." *Town of W. Hartford*, 991 F.2d at 1045. The district court in *Bray* had granted injunctive relief under § 1985(3), based on interference with the right to interstate travel. That decision was subsequently affirmed by the Fourth Circuit. *See NOW v. Operation Rescue*, 726 F.Supp. 1483 (E.D.Va.1989), *aff'd per curiam* 914 F.2d 582 (4th Cir.1990). The Supreme Court reversed on essentially two grounds: (1) that on the record before it, the plaintiffs had not established the invidious animus element of § 1985(3); and (2) that, also on



the record before it, the plaintiffs had not established that defendants intended to hinder the right to travel. The Court also held that deprivation of the right to abortion cannot be the object of a purely private conspiracy.

In terms of the animus requirement, the Supreme Court held that:

> To begin with, we reject the apparent conclusion of the District Court . . . that opposition to abortion constitutes discrimination against the "class" of "women seeking abortion" . . . . [T]he class "cannot be defined simply as the group of victims of the tortious action." "Women seeking abortion" is not a qualifying class.
>
> Respondents' contention, however, is that the alleged class-based discrimination is directed not at "women seeking abortion" but at women in general. We find it unnecessary to decide whether *that* is a qualifying class under § 1985(3), since the claim that petitioners' opposition to abortion reflects an animus against women in general must be rejected. We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex*–for example . . . , the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law. The record in this case does not indicate that petitioners' demonstrations are motivated by a

> purpose (malevolent or benign) directed specifically at women as a class . . . . Given this record, respondents' contention that a class-based animus has been established can be true only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect. Neither proposition is supportable.

— U.S. at —, 113 S.Ct. at 759-60 (quoting *Carpenters*, 463 U.S. at 850, 103 S.Ct. at 3367 (Blackmun, J., dissenting)).

In terms of the right to interstate travel, the Supreme Court held that:

> [I]t does not suffice for application of § 1985(3) that a protected right be incidentally affected. A conspiracy is not "for the purpose" of denying equal protection simply because it has an effect upon a protected right. The right must be *"aimed at,"*; its impairment must be a conscious objective of the enterprise . . . . [T]he "intent to deprive of a right" requirement demands that the defendant do more than merely be aware of a deprivation of right that he [or she] causes, and more than merely accept it; he [or she] must act at least in part for the very purpose of producing it. That was not shown to be the case here, and is on its face implausible. Petitioners oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel.



> Respondents have failed to show a conspiracy to violate the right of interstate travel for yet another reason: petitioners' proposed demonstrations would not implicate that right. The federal guarantee of interstate travel . . . protects interstate travelers against two sets of burdens: "the erection of actual barriers to interstate movement" and "being treated differently" from intrastate travelers. As far as appears from this record, the only "actual barriers to movement" that would have resulted from Petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them.

*Id.* at —, 113 S.Ct. at 762-63 (citations and footnote omitted).

Although the district court in *Bray* had not addressed whether the right to an abortion had been infringed, the Supreme Court chose to address the issue, and held that the right to an abortion under the Fourteen Amendment was also an inadequate basis for respondents' § 1985(3) claim because deprivation of the right to an abortion "cannot be the object of a purely private conspiracy." *Id.* at —, 113 S.Ct. at 764. The Court held that "[w]hereas, unlike the right of interstate travel, the asserted right to an abortion was assuredly 'aimed at' by the petitioners, deprivation of that federal right (whatever its contours) cannot be the object of a purely private

conspiracy." *Id.*

D. *The Second Circuit's Interpretation of Bray in Town of W. Hartford v. Operation Rescue.*

Given this seemingly clear-cut language in *Bray*, plaintiffs in the instant case initially conceded that, after *Bray*, their § 1985(3) claim was subject to dismissal for failure to state a claim. *See* Item No. 349, at 3. Nevertheless, on April 21, 1993, the Second Circuit decided *Town of W. Hartford* and held that *Bray* does not foreclose all resort to § 1985(3) in all cases involving the obstruction of access to abortion clinics. 991 F.2d at 1048 (holding that such an assertion constitutes an over-reading of *Bray*).

The Second Circuit interpreted *Bray* as setting forth two grounds for reversal–that on the record before the Supreme Court, the plaintiffs there had not established the invidious animus ingredient of § 1985(3), *id.* at 1045, and that, also on the record before the Court, the plaintiffs had not established that defendants intended to hinder the right to travel. *Id.* at 1047.

With respect to the animus requirement, the Second Circuit noted that after *Bray*: "(1) women seeking abortions do not constitute a class protected by § 1985(3), and (2), if women in general constitute a class protected by the statute . . . 'the claim that petitioners' opposition to abortion reflects an animus against women in general must be rejected.'" *Id.* at 1048 (quoting *Bray*, — U.S. at —, 113 S.Ct. at 759). The Court nevertheless held that the Supreme Court's analysis of the animus requirement was tied to the facts there adduced. "Accordingly, we think that an assessment of the animus



aspect of the case at bar requires a further review, in the light of the legal principles relating to animus announced in *Bray*, of the record evidence bearing on appellants' motivation." *Id.*

The Second Circuit also held that:

> a determination of whether appellants intended to and did inhibit a right protected by § 1985(3) – either the Fourteenth Amendment abortion right, protected against the state; or the citizenship right to travel without public or private impediment – calls for scrutiny of the instant record through the prism of the *Bray* Court's pronouncement that "impairment [of the right] must be a conscious objective of the enterprise."

*Id.* (quoting *Bray*, — U.S. at —, 113 S.Ct. at 762).

The Second Circuit did not specifically address the Supreme Court's analysis with respect to the right to abortion, but remanded to the district court to determine, in light of *Bray*, whether intent was established to interfere with the right to abortion as well as the right to interstate travel. *Id.* In a footnote, the Court instructed the district court that "it would be well . . . to reconsider, in the light of *Carpenters v. Scott*, 463 U.S. 825, 830-34, 103 S.Ct. 3352, 3357-59, 77 L.Ed.2d 1049 (1983), the state involvement aspect of the [plaintiff's] claim of interference with the abortion right." *Id.* n. 11.

E. *Effect of Bray and Town of W. Hartford on Plaintiffs' § 1985(3) Claim.*

Resolution of defendants' motion to dismiss requires the

Court to accept the material facts alleged in plaintiffs' complaint as true, *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir.1991) (citing *Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964) (per curiam)); *Dwyer v. Regan*, 777 F.2d 825 (2d Cir.1985), *modified on other grounds*, 793 F.2d 457 (2d Cir.1986), and to construe the allegations of the complaint in the light most favorable to plaintiffs. *Papasan v. Allain*, 478 U.S. 265, 283, 106 S.Ct. 2932, 2943, 92 L.Ed.2d 209 (1986).

However, even reading the complaint in the light most favorable to plaintiffs, and accepting the material facts alleged as true, the Court finds that, after *Bray*, plaintiffs' complaint does not state a claim under § 1985(3) upon which relief can be granted. The allegations in plaintiffs' complaint were geared toward the definition and interpretation of the animus and interference requirements prior to *Bray*. The law has since been redefined, and plaintiffs' allegations no longer set forth a cognizable § 1985(3) claim. The allegation that defendants are motivated by an invidiously discriminatory animus directed at women seeking abortions, for example, has been explicitly rejected by the Supreme Court. *Bray*, — U.S. at —, 113 S.Ct. at 759- 60; *see also Town of W. Hartford*, 991 F.2d at 1048. Accordingly, plaintiffs' complaint, in its present form, fails to state a claim under § 1985(3), and defendants' motion to dismiss must therefore be granted as to that claim.

Nevertheless, the Second Circuit in *Town of W. Hartford* interpreted *Bray* not as a requirement that every § 1985(3) claim in the various abortion protest cases throughout this Circuit be dismissed outright, but rather as a decision based on the particular facts of the case, such that district courts in this Circuit should reconsider their cases and injunctions in light of the Supreme Court's interpretation of the animus and



interference elements of § 1985(3). Because *Town of W. Hartford* clearly affords plaintiffs an opportunity to attempt to conform their § 1985(3) claim to the holding in *Bray*, the Court grants plaintiffs leave to file an amended complaint, specifically, an amended § 1985(3) cause of action.[3]

Defendants assert that *Town of W. Hartford* requires the Court to vacate its preliminary injunction. Although the Second Circuit did vacate the injunction in place in *Town of W. Hartford* prior to remanding to the district court, the injunction at issue there was a permanent injunction and the Court vacated it with the express intent to allow the district court to take a fresh look at it in light of *Bray*. 991 F.2d at 1048. Here, the injunction is preliminary, the record is open, and discovery is ongoing. This Court is therefore not required by the holding in *Town of W. Hartford* to vacate the preliminary injunction. *See also Bray*, — U.S. at —, 113 S.Ct. at 768 (Even where § 1985(3) claims were dismissed, Court declined to vacate the injunction and dismiss the entire action. Instead, it remanded the case to the district court to consider

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3. Plaintiffs assert that *Town of W. Hartford* rendered moot the entire premise of defendants' motion to dismiss such that the case remains in the same pendent jurisdiction posture it has been in all along. Item No. 366, at 7. The Court disagrees. Defendants' motion to dismiss is not moot because the issue is whether plaintiffs' complaint sets forth a § 1985(3) claim under *Bray*. The answer to that question is clearly no, and the Second Circuit's interpretation of *Bray* in *Town of W. Hartford* does not change that result. *Town of W. Hartford* merely limits *Bray* 's dismissal of the § 1985(3) claim to the facts of that case and affords plaintiffs an opportunity to amend their § 1985(3) claim to fit within the holding in *Bray*.

whether the same scope of injunctive relief was warranted on the remaining state-law claims.).

In a related argument, defendants assert that plaintiffs are limited to the record presently before the Court in establishing their ability to bring their § 1985(3) claim within *Bray*. The Court disagrees. This argument involves two separate considerations – the granting of defendants' motion to dismiss the § 1985(3) claim with leave to amend, and the viability of the preliminary injunction, which is grounded in part on the § 1985(3) claim.

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With respect to the motion to dismiss, there is no question that a court has authority to grant a motion to dismiss with leave to amend. *See, e.g.*, Fed.R.Civ.P. 15(a). If plaintiffs, after further investigation of their ability to bring their § 1985(3) claim within *Bray*, decide to amend their complaint, and set forth a § 1985(3) claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6), plaintiffs will clearly be able to utilize the discovery process to gather evidence in support of their amended claim.

With respect to the viability of the preliminary injunction, if plaintiffs file an amended complaint setting forth a legally cognizable § 1985(3) claim, the Court will likely be required to hold a supplemental hearing to reevaluate plaintiffs' ability, after *Bray*, to establish, by a preponderance of the evidence, their likelihood of success on their § 1985(3) claim, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in their favor with respect to that



claim.[4] *See Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 972 (2d Cir.1989). Prior to any such hearing, plaintiffs would be required to submit memoranda of law addressing the legal impact of *Bray* and *Town of W. Hartford* on their § 1985(3) claim,[5] as well as affidavits of fact witnesses setting forth how they intend to establish the animus and interference requirements in light of these cases.[6] In attempting to bring their § 1985(3) claim within *Bray*, and establish the

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4. The Court notes, however, that the preliminary injunction is grounded not only on the § 1985(3) claim, but two state-law claims as well. Further, the Court has decided to continue to exercise pendent jurisdiction over the state-law claims regardless of the ultimate disposition of the § 1985(3) claim. *See infra* at 1027-32.

5. Plaintiffs would, for example, be required to address in greater detail their previous assertion that the Second Circuit decision in *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir.1990), allows them to establish interference with the right to interstate travel without establishing a particular intent to disrupt interstate as opposed to intrastate travellers–an assertion that appears to be contrary to the explicit holding in *Bray*. *See* Item No. 366, at 9-10. Plaintiffs would also be required to address the impact of the *Bray* Court's discussion of interference with the right to abortion, in light of the fact that the Second Circuit did not specifically address that aspect of the *Bray* holding in *Town of W. Hartford*. 991 F.2d at 1048 n.11.

6. *Town of W. Hartford* makes clear that plaintiffs must establish the animus and interference requirements based on the particular facts of this case. They cannot, for example, rely on studies and theories with respect to the motivation of abortion protestors in general. Their proffer must be fact-specific.

requirements for a preliminary injunction, plaintiffs would not be constrained by the Court's prior findings in its preliminary injunction decision and order. The Court's findings and the evidence presented were based on the then-controlling interpretation of the animus and interference requirements in the Second Circuit. To limit plaintiffs to the record presently before the Court would be tantamount to requiring them to have anticipated the Supreme Court's ruling in *Bray*. In providing plaintiffs an opportunity to fit their § 1985(3) claim within that ruling, *Town of W. Hartford* cannot be interpreted as precluding this Court from considering additional evidence or making new findings of fact in light of it.

Thus, the Court grants defendants' motion to dismiss as to plaintiffs' § 1985(3) claim only, with leave to plaintiffs to amend the complaint to bring their § 1985(3) claim within the holding in *Bray*.

II. *Pendent Jurisdiction*[7]

Regardless of the ultimate disposition of plaintiffs' §

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7. The instant lawsuit was commenced prior to the December 1, 1990 effective date of the statute providing for "supplemental" jurisdiction rather than "ancillary" and "pendent" jurisdiction. Accordingly, the concept of "pendent" jurisdiction applies in this case. Nevertheless, the Court notes that the statute providing for supplemental jurisdiction essentially "codif[ied] existing caselaw" on the subject of pendent jurisdiction. *See* 28 U.S.C. § 1367; *see also Castellano v. Board of Trustees*, 937 F.2d 752, 758 (2d Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 378, 116 L.Ed.2d 329 (1991).



1985(3) claim, the Court will continue to exercise pendent jurisdiction over the six state-law claims.[8] The Court makes this determination at this juncture due to its granting of defendants' motion to dismiss the § 1985(3) claim, albeit with leave to plaintiffs to amend, as well as its determination that even without the § 1985(3) claim, the Court would be compelled, under notions of judicial economy, convenience, fairness and comity, to continue to exercise jurisdiction over the remaining state-law claims.

A federal court may exercise pendent jurisdiction over state-law claims "whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349, 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988) (quoting *Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966)). The decision to exercise pendent jurisdiction is within the discretion of the district court and, in exercising that discretion, the court should "consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction . . . ." *Id.* 484 U.S. at 350, 108 S.Ct. at 619 (citing *Gibbs*, 383 U.S. at 726-27, 86 S.Ct. at 1139). The Court has carefully considered and weighed the values of judicial economy, convenience, fairness and comity, and finds

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8. The six state-law claims are as follows: the New York Civil Rights Law and trespass claims upon which the preliminary injunction is in part based, as well as claims for tortious interference with business, intentional infliction of emotional harm, tortious harassment, and false imprisonment.

that they point definitively toward retention of jurisdiction over plaintiffs' state-law claims in this case.

A. *Judicial Economy, Convenience and Fairness.*

Defendants assert essentially two arguments in support of their contention that the judicial economy, convenience and fairness factors do not point to continued exercise of pendent jurisdiction over plaintiffs' state law claims: (1) assuming plaintiffs' § 1985(3) claim is ultimately dismissed, it will likely be dismissed prior to trial, leaving plaintiffs without a federal claim; and (2) the Court's involvement in this case has not been substantial, as evidenced by the case's procedural posture.

The Supreme Court held in *Gibbs* that "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." 383 U.S. at 726, 86 S.Ct. at 1139; *see also Baylis v. Marriott Corp.*, 843 F.2d 658, 664 (2d Cir.1988) ("The basis for retaining jurisdiction is weak when . . . the federal claims are dismissed before trial."). However, subsequent Supreme Court decisions made clear that *Gibbs* "d[id] not establish a mandatory rule to be applied inflexibly in all cases." *Carnegie-Mellon*, 484 U.S. at 350 n. 7, 108 S.Ct. at 619 n. 7 (citing *Rosado v. Wyman*, 397 U.S. 397, 403-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970)). "Th[at] statement [in *Gibbs* ] simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine--judicial economy, convenience, fairness, and comity--will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.*

This is not the "usual" case, and the factors of judicial



economy, convenience and fairness can only be served by the Court's retention of pendent jurisdiction over plaintiffs' state-law claims. "[E]ven when federal claims are resolved before trial, comity does not automatically mandate dismissal of pendent state claims." *Enercomp, Inc. v. McCorhill Pub., Inc.*, 873 F.2d 536, 545 (2d Cir.1989) (citations omitted). "'Trial is simply a convenient benchmark marking the point by which substantial resources have surely been committed. If those resources are expended without a trial, the essential purpose of the doctrine of pendent jurisdiction may be served by retaining the case.' " *Id.* (quoting *Graf v. Elgin, Joliet & E. Ry.*, 790 F.2d 1341, 1348 (7th Cir.1986)).

Because the Court finds that substantial resources have been expended in this case, despite its pre-trial procedural posture, it also rejects defendants' argument seeking to minimize and trivialize the nature and extent of this Court's involvement in this case over the almost three years of its pendency. There is no dispute that this case is presently in a discovery posture; that plaintiffs filed a fourth amended complaint in December 1992; and further, that the Court has now permitted the filing of a fifth amended complaint to allow plaintiffs to amend their § 1985(3) claim. However, the list of motions and issues addressed by this Court over the past three years is substantial. In addition, such a list is incapable of fully and adequately reflecting the amount of time and judicial resources this Court has expended on this case.

Soon after the Court granted plaintiffs' motion for a temporary restraining order in September 1990, defendants made a motion to dismiss or stay the action pursuant to the abstention doctrine, which the Court denied after extensive briefing and lengthy oral argument. During the same time

period, from December 1990 to January 1991, the parties, with the assistance of the Court, attempted unsuccessfully to settle this action. A hearing on plaintiffs' motion for a preliminary injunction was held from March 6, 1991 to April 1, 1991. That motion also required extensive post-hearing briefing and argument. As noted previously, the Court's decision on plaintiffs' motion for a preliminary injunction was ultimately rendered on February 14, 1992.[9]

Between February 1991 and January 1992, the Court held hearings and oral argument on three motions for civil contempt. The hearing relative to Nancy Walker was held from February 6, 1991 to February 14, 1991; the Bonnie Behn and Carla Rainero hearing was held from June 18, 1991 to July 12, 1991; and the hearing relative to the Revs. Paul and Robert Schenck and Project Rescue was held from October 15, 1991 to January 30, 1992.[10] The Court considered evidence adduced at these contempt hearings as well as the evidence presented at

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9. Some of the defendants appealed the preliminary injunction decision to the Second Circuit. *See* Item No. 136. By stipulation and order filed April 1, 1993, that appeal, No. 92-7302, was dismissed without prejudice to reinstatement by any party's counsel within twenty days of this Court's resolution of the instant motion. Item No. 363.

10. The Court later determined that Rev. Paul Schenck had made false statements under affirmation during the hearing on his contempt motion, and that the possibility existed that a crime had been committed. Accordingly, the Court referred the matter to the United States Attorney for "whatever action he deem[ed] appropriate." Item No. 250, at 17 n. 9. That matter is still pending.



the preliminary injunction hearing in determining whether to grant plaintiffs' motion for a preliminary injunction. *Pro-Choice Network*, 799 F.Supp. at 1421. On May 27 and May 28, 1992, the Court held a hearing on a fourth motion for civil contempt filed against Rev. Paul Schenck and Rev. Darren Drzymala. Written decisions were filed granting each of the motions for civil contempt as to all of the named individuals.[11] Plaintiffs were awarded judgments pursuant to the terms of the temporary restraining order, as well as reasonable attorneys' fees and costs. The attorneys' fees issues continue to involve this Court and Magistrate Judge Carol E. Heckman, to whom the motions were referred for report and recommendation.

In the Spring of 1992, the Court became involved in the Pro-Life Movement's convergence on Buffalo, New York for what was termed the "Spring of Life." Prior to the demonstration's commencement in late April 1992, the Court heard argument on a motion by Children's Hospital to intervene as a plaintiff; a motion by plaintiffs to modify the preliminary injunction and amend the complaint; and a motion by defendants to stay the preliminary injunction pending appeal. In a decision and order dated April 16, 1992, the Court granted Children Hospital's motion to intervene; denied plaintiffs' motion to modify the injunction without

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11. These decisions were appealed to the Second Circuit. On May 26, 1993, the Second Circuit dismissed the appeals of Nancy Walker, No. 92-7854, and Bonnie Behn and Carla Rainero, No. 92-7954, for lack of appellate jurisdiction. *Pro-Choice Network v. Walker*, 994 F.2d 989 (2d Cir. May 26, 1993). On June 15, 1993, the appeals in the other two contempt cases, Nos. 92-9124 and 92-9202, were reactivated, Item No. 371, and are currently pending before the Second Circuit.

prejudice; and denied defendants' motion for a stay. Plaintiffs' motion to amend the complaint was later granted by Magistrate Judge Heckman, to whom it had been referred.[12]

As a result of the Spring of Life protests, criminal contempt charges were instituted against six individuals. These cases were referred to the United States Attorney's Office, but after reconsideration, were transferred to two Court-appointed Special Prosecutors. *See In re Slovenec*, 799 F.Supp. 1441 (W.D.N.Y.1992). Thereafter, the Court became involved in the complex issue of whether the alleged contemnors were entitled to a jury trial; ruled on a substantive motion in limine; and heard the guilty pleas and imposed sentence on each of the defendants. Finally, in March 1993, the Court was faced with a recusal motion by defendants.

Moreover, the Court's involvement in this case is ongoing. During the pendency of the instant motion, there were alleged violations of the terms of the preliminary injunction on four separate occasions–April 17, 1993, April 24, 1993, May 1, 1993 and May 15, 1993. The Court was made aware of such violations in June 1993, when plaintiffs presented the Court with orders to show cause why certain named individuals should not be held in civil and criminal contempt. The Court signed the orders to show cause on July 1, 1993, indicating its intention to proceed criminally against

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12. The motion to amend was separately referred to Magistrate Judge Heckman on September 4, 1992. The entire case was referred to her on August 19, 1992, for resolution of all pretrial matters and to hear and report on all dispositive motions. Since that time, Magistrate Judge Heckman has been involved in the supervision of discovery and other pretrial matters.



the alleged contemnors, and referred the investigation and prosecution of these cases to the United States Attorney. Because these alleged violations occurred at a time when the preliminary injunction was still in place, the Court's involvement would not end even if the injunction were vacated prior to their resolution.

Given the above accounting of the Court's involvement in this action, not to mention the past and future involvement of the Second Circuit Court of Appeals,[13] it is clear that substantial judicial resources have been expended regardless of the ultimate disposition of the § 1985(3) claim and its timing. While the Court recognizes that judicial economy should not be the controlling factor, *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 564 (2d Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 2829, 115 L.Ed.2d 998 (1991), to ignore the Court's substantial involvement in this case over a period of almost three years, simply on the ground that the case is in a pre-trial mode, would be to ignore the reality of scarce judicial resources and the positive aspects of preventing needless duplication of legal proceedings in federal and state court. The Supreme Court has indicated its unwillingness "to defeat the commonsense policy of pendent jurisdiction–the conservation of judicial energy and the avoidance of multiplicity of litigation–by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim." *Rosado*, 397 U.S. at 405, 90 S.Ct. at 1214.

In addition, this Court's familiarity with the factual and

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13. *See supra* notes 9 and 11.

legal issues involved in this case weighs in favor of the exercise of pendent jurisdiction, *Enercomp*, 873 F.2d at 546; *Philan Ins. Ltd. v. Frank B. Hall & Co.*, 786 F.Supp. 345, 347 (S.D.N.Y. 1992); *see also Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir.1990), and is such that "it would . . . [be] a pointless waste of judicial resources to require a state court to invest the time and effort necessary to familiarize itself with a case well-known to [this Court]." *Enercomp*, 873 F.2d at 546. "To require [this Court's efforts] to be duplicated in state court would hardly . . . serve[ ] the interests of economy, convenience and fairness that are central to any exercise of pendent jurisdiction." *Id.* at 545 (citing *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139).

Thus, the Court finds that the judicial economy, convenience and fairness factors weigh heavily in favor of the Court retaining pendent jurisdiction over the state-law claims.

B. *Comity and Federalism.*

The interests of comity and federalism do not point toward divestiture of pendent jurisdiction in this case.

1. Novel and Unsettled Issues of State Law

Defendants assert that the Court should decline to exercise jurisdiction over the state-law claims because they present novel and unsettled issues of state law. *See Castellano*, 937 F.2d at 758-59; *Independent Bankers Assoc. v. Marine Midland Bank*, 757 F.2d 453, 464-65 (2d Cir.1985), *cert. denied*, 476 U.S. 1186, 106 S.Ct. 2926, 91 L.Ed.2d 554 (1986). While the Court notes that "[f]ailure to dismiss a pendent claim after dismissing a federal claim 'may be an abuse of the district



court's discretion' especially when the state claim involves novel questions of state law," *Raucci*, 902 F.2d at 1054 (quoting *Robison v. Via*, 821 F.2d 913, 925 (2d Cir.1987)), it finds that even if one or two of the state-law claims in this case involve a novel or unsettled question of New York law, there are six state-law claims and the Court is not required to consider any novel question of state law in order to keep the preliminary injunction in place. In addition, the Court is familiar with the state-law claims from the hearing on the preliminary injunction; the injunction was ultimately based in part on the Court's finding that plaintiffs were likely to succeed on at least two of the state-law claims.[14]

2. Prejudice to Plaintiffs

A declination by the Court to exercise jurisdiction over the state-law claims, assuming the § 1985(3) claim was ultimately dismissed, would result in substantial prejudice to plaintiffs in having to relitigate their case in state court, both in terms of time and expense, and the prejudice associated with being without an injunction for perhaps an extended period of time. Contrary to defendants' continued assertions, the state court action instituted by plaintiffs prior to the instant federal court action is not pending in any true meaning of the word.

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14. As previously noted, the Court's preliminary injunction decision and order only addressed two of plaintiffs' six state-law claims–New York Civil Rights Law and trespass–finding that because those claims and the § 1985(3) claim were sufficient to grant plaintiffs' motion for a preliminary injunction, it need not address whether a preliminary injunction should be granted based on the other state-law claims. *Pro-Choice Network*, 799 F.Supp. at 1432 n. 11.

Indeed, such continued assertion by defendants' counsel is a clear misrepresentation of what has occurred or is occurring in state court. No action has taken place in the state case either by plaintiffs or defendants essentially since the initiation of the instant lawsuit. Indeed, the Court has been advised by counsel that the state action has been "marked off" and stricken from the calendar, and that if it is not restored to the calendar by November 25, 1993, the action will be determined abandoned and will be dismissed for neglect to prosecute. *See* Item No. 355, Addendum, Letter to Counsel from New York State Supreme Court Justice Thomas P. Flaherty.

Further, defendants' federalism and comity arguments are nothing more than a rehashing of arguments rejected by this Court when it declined to grant defendants' abstention motion. In its abstention decision and order of October 29, 1990, the Court explicitly found that the state and federal actions were not parallel; that even as of October 1990, the state action was largely inactive; and that neither the state nor federal action raised critical state concerns warranting the Court's abstaining from exercising its jurisdiction over the federal action. Item No. 34. Even the ultimate failure of plaintiffs' § 1985(3) claim would not require a different result. *See Terry II*, 961 F.2d at 396 (noting that *Bray* would have little impact on the injunction in place there because the order was fully supported by adequate and independent state-law grounds); *NOW v. Operation Rescue*, 816 F.Supp. at 730-31 (holding that District of Columbia-law claims provide sufficient basis for "retaining federal jurisdiction, enforcing the Injunction, protecting the previously established rights of plaintiffs, and vindicating the vital authority of a United States District Court"); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 681 F.Supp. 688, 691-92 (D.Or. 1988)



(upholding preliminary injunction against anti-abortion demonstrators based on pendent state-law claims after § 1985(3) claim was dismissed).[15] Fundamentally, with or without a § 1985(3) claim, this case involves a significant federal interest in balancing what are in essence, conflicting rights guaranteed by the United States Constitution–the First Amendment right of free speech, and the Fourteenth Amendment right to an abortion. The federal courts have as much interest in protecting these rights as New York State. This is so regardless of the Supreme Court's decision in *Bray*.

3. DiLaura v. Power Authority

Finally, defendants assert that the Court's decision not to exercise pendent jurisdiction in *DiLaura v. Power Auth.*, 786 F.Supp. 241 (W.D.N.Y. 1991), *aff'd*, 982 F.2d 73 (2d Cir.1992), in effect requires the Court to decline to do so here. Initially, the Court will not be compelled to rule in a particular way based simply on prior holdings it has made in prior unrelated cases. Further, the decision whether or not to exercise pendent jurisdiction is a discretionary one arrived at through

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15. The Court also notes the following cases in which injunctions similar in scope to the instant injunction have been upheld solely on state-law grounds: *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dept.1982) (injunction based on New York law enjoining blocking of ingress and egress, and physically abusing or harassing people seeking services at abortion clinic); *O.B.G.Y.N. Assoc. v. Birthright of Brooklyn & Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (2d Dept.1978) (injunction based on New York law enjoining various forms of picketing, chanting and shouting in vicinity of abortion clinics).

the careful weighing of various factors which, depending on the specific facts of the case, may have more or less application. "[T]he doctrine of pendent jurisdiction . . . is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon*, 484 U.S. at 350, 108 S.Ct. at 619. To the extent, however, that the Court's pendent jurisdiction analysis in *DiLaura* is relevant to the instant case, the Court finds defendants' arguments unpersuasive. The declination to exercise pendent jurisdiction in *DiLaura* was based primarily on a finding that the interests of federalism and comity strongly supported the dismissal of the state-law claim because the exercise of pendent jurisdiction "would run contrary to Congress' pronounced intent not to invade the jurisdiction of the States" in the areas of property rights and tort liability. 786 F.Supp. at 254. The Court's decision in *DiLaura* was also based on a finding that the considerations of judicial economy, convenience and fairness were not substantially implicated where, despite the number of years the case had been pending, the Court's involvement had been slight and the parties would not be prejudiced by dismissal of the state claim. *Id.* at 254-55.

Thus, because this case is not the "usual" case where dismissal of all federal claims prior to trial would point toward declining to exercise jurisdiction over the remaining state-law claims, the Court finds that it would be a waste of judicial resources to deny pendent jurisdiction. The Court's decision to exercise pendent jurisdiction over the state-law claims, regardless of the ultimate disposition of the § 1985(3) claim, leaves without question the viability and continued enforceability of the preliminary injunction.



## CONCLUSION

For the reasons set forth above, the Court grants defendants' motion to dismiss plaintiffs' § 1985(3) claim pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. However, based on *Town of W. Hartford*, the Court grants plaintiffs leave to amend their fourth amended complaint to attempt to bring their § 1985(3) claim within the Supreme Court's holding in *Bray*. Because the Court wishes to provide plaintiffs sufficient time not only to evaluate their ability to state a § 1985(3) claim after *Bray*, but also their ability to establish facts supporting such a claim, as required by *Town of W. Hartford*, the Court grants plaintiffs until October 1, 1993 to file their amended complaint. Defendants will have until November 1, 1993 to answer or otherwise move. If plaintiffs decide not to file an amended complaint, they should promptly notify the Court so this case can move forward.

In conjunction with its ruling on defendants' motion to dismiss, the Court denies defendants' motion to vacate the injunction, and continues, regardless of the ultimate disposition of the § 1985(3) claim, to exercise pendent jurisdiction over plaintiffs' state-law claims.

IT IS SO ORDERED.

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## QUESTIONS PRESENTED

1. Whether, in light of the extensive record of defendants' admitted illegal behavior, and their continued obstruction of access to health care facilities and dangerous grabbing, shoving, crowding and harassing people trying to enter or leave these facilities despite a temporary restraining order (TRO) prohibiting this conduct, two challenged provisions in a preliminary injunction are no more burdensome to defendants' free speech rights than necessary to protect the governmental interests in ensuring safe provision of health care, medical privacy, public safety and free flow of traffic, protecting private property rights, and securing safe conditions for exercising an important constitutional right. The pertinent provisions of the preliminary injunction are:

a. Paragraph 1(b), which prohibits demonstrating within a fixed "buffer zone" 15 feet from driveway and doorway entrances to healthcare facilities, but allows two "sidewalk counselors" to enter the "buffer zone";

b. Paragraph 1(b), which establishes a 15 foot "bubble zone" around vehicles and people seeking ingress to or egress from the health care facilities, into which only two demonstrators may enter to engage in peaceful, nonthreatening "sidewalk counseling"; and

c. Paragraph 1(c), which provides that people have the right to refuse "sidewalk counseling" and to walk away, and that when people do so, the "sidewalk counselors" must "cease and desist" and back away 15 feet from the targeted people.

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## STATEMENT OF THE CASE

Whether an injunction "burdens no more speech than necessary to serve a significant government interest," *Madsen v. Women's Health Center*, 512 U.S. ---, 114 S. Ct. 2516, 2525 (1994), necessarily is a fact-sensitive inquiry. Yet Petitioners notably ignore or mischaracterize the extensive factual record of illegal behavior, including blockades, continued physical obstruction of plaintiff health care facilities despite arrests and a prior injunctive order, and ongoing dangerous harassment and intimidation of patients and staff. To cure that omission, Respondents present in substantial detail the facts that were before the district court.

This case involves a persistent, continuous campaign by defendants to shut down or otherwise interfere with the provision of reproductive and gynecological health care by hospitals and clinics in the Buffalo and Rochester, New York area. Beginning in 1988, defendants commenced a series of mass blockades and other disruptions of area health care facilities. The district court found that defendants use three categories of tactics to obstruct clinics and harass people using the facilities. The first is a "blockade," in which large numbers of demonstrators trespass on medical center property and sit in or lie down in front of entrances in order to effect a complete barrier, thus blocking access to and egress from the health care facilities. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1424 (W.D.N.Y.- 1992). During some "blockades," defendants invaded clinic facilities and "chain[ed] themselves together in order to make it more difficult for police to remove them." *Id.* at 1424.

The district court labeled the second obstructive strategy "constructive blockades," because the actions have the same purpose and effect as full-fledged blockades: to prevent patients from entering the clinics and to force people "to run a gauntlet of harassment and intimidation" when they seek to enter. *Id.* Constructive blockade activity consists of congregating in or near driveways in order to obstruct these entrances, making loud and disruptive noise, and "crowd[ing] around people trying to enter the

facilities in an intimidating and obstructing manner, and grab[bing], push[ing] and shov[ing] the patients, patient escorts and staff." *Id.*

The third type of intimidating, interfering, and harassing activity is "sidewalk counseling," which involves a face-to-face encounter between demonstrators and their targets, purportedly to proffer literature and to attempt to persuade patients not to have an abortion. Because of the "privacy concerns of the patients, even peaceful counseling, when conducted in the compressed space at the entrances of the medical facilities, often erupts into a charged encounter between 'sidewalk counselors,' patients and patient escorts." *Id.* at 1425. The district court further found that "sidewalk counseling" often was not peaceful, but rather involved "harassing, badgering, intimidating and yelling at the patients," and "crowd[ing] around patients, invad[ing] their personal space and rais[ing] their voices to a loud and disturbing level." *Id.*

The district court found that these tactics impeded safe and unfettered access to and egress from the facilities, intimidated people seeking access, caused serious health risks and sometimes physical injury, and disrupted the "atmosphere necessary for rendering safe and efficacious health care." *Id.* at 1424.

1. ***Proceedings in the District Court***

Threatened with another in an ongoing series of mass blockades that defendants announced would occur on September 28, 1990, Respondents commenced this case on September 24, 1990, and sought a TRO. Respondents are several physicians and health care facilities in the Buffalo and Rochester New York area that provide gynecological and family planning health care, including abortion services, and the Pro-Choice Network of Western New York, a volunteer organization whose goal is to maintain safe and legal access to abortion.

Evidence introduced regarding the location and



configuration of each plaintiff health care facility[1] revealed that, given the nature of the sites, defendants' activities also affected other health care institutions and businesses. For example, plaintiff Womenservices was next door to a post office, and shared a driveway ramp with the U.S. Postal Service. Defendants often blocked postal trucks. (Tr. 186-88, 433-36, 461-64)[2] Plaintiff Dr. Davis' office was in a building with other businesses and residential apartments, and the property manager received complaints from tenants about the obstruction and noise from anti-abortion demonstrators. (Walker Tr. 228) Plaintiffs Dr. Press and Dr. Wortman provided a full range of gynecological and obstetrical services, including treatment for high risk pregnancies and laser surgery for ovarian cysts, endometriosis, fibroid tumors, and other conditions. (Tr. 876) Erie Medical Center shared a medical office building with many other doctors, and was located across the street from Buffalo General Hospital. People accosted by defendants often were not abortion patients, but those seeking other medical services in the building. (Tr. 293-94) Plaintiffs Alexander Women's Group and Highland Obstetrical Group both are group ob-gyn practices located inside Genessee and Highland Hospitals, respectively, where anti-abortion demonstrators harassed patients seeking many kinds of medical treatment,

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[1] The district court heard testimony about each location and saw photographs. (Pls. Exs. 24 -29 at Prelim. Inj. Trial; Exs. 1-A -- 1-I at Walker contempt trial) The court also requested, and plaintiffs later submitted on Sept. 18, 1991, site plans indicating the proposed 15 foot buffer zones. R. 497. (These site plans have been lodged with this Court.) The plans show that at every location, the 15 foot buffer zone around driveways and doorway entrances allows defendants to congregate on the sidewalks or grassy strips adjacent to the health care facilities.

[2] Citations to the preliminary injunction trial transcript are designated as "Tr."; to testimony at the contempt trials is referred to as "Walker Tr." or "Schenck Tr." etc. "JA" refers to the Joint Appendix; "R." indicates the docket sheet record number.

including cancer care and psychiatric counseling. (Tr. 733-41)

The defendants included approximately 50 individuals who had repeatedly engaged in illegal blockade activities at plaintiffs' medical facilities. All individual defendants had previously been arrested and convicted for participating in blockades, trespasses, or harassment at the medical facilities. The complaint chronicled 18 such blockades from the spring of 1988 through the spring of 1990. (JA 56-62) Petitioner Paul Schenck was one of the most persistent lawbreakers: He had three criminal convictions for blockades or "chain gang" invasions. (Second Amended Complaint ¶ 17, JA 38) Petitioner Dwight Saunders was convicted for leading and participating in a blockade of plaintiff Womenservices in October 1989. (JA 39) In their answer defendants admitted their arrests and convictions. (JA 72-74)

After a hearing on plaintiffs' request for a TRO, on September 27, 1990 the district court issued an order enjoining defendants from blocking or obstructing or trespassing on plaintiffs' facilities, and from "physically abusing or tortiously harassing" people seeking access to or egress from the health care centers. The TRO also prohibited demonstrating within 15 feet of people seeking access to the health care facilities, but it did not establish any "buffer zone" the around entrances. The TRO allowed "sidewalk counselors" into the 15 foot clear zone around people, but required "sidewalk counselors" to "cease and desist" if someone wanted to walk away and not be counseled. (The TRO is at JA 22-26.) Shortly after entering the TRO, the district court issued a written clarification, stating that the injunction was "directed to activities at the sites chosen for demonstrations," i.e., at the clinics themselves. (JA 28-29) Petitioners have never thereafter sought any clarification or modification regarding the injunction's geographical range.

While defendants complied with the TRO by not carrying out their threatened mass blockade on September 28, 1990, their demonstration that day at Dr. Press' office made so much noise it disrupted health care. (Tr. 1012-13) Soon after the TRO's issuance



they resumed the "constructive blockade" and "sidewalk counseling" tactics. The district court found that these tactics congested the clinic entrances, streets, and sidewalks to such a degree that access and egress were impeded, and that patients and staff were intimidated, harassed, and physically threatened. 799 F. Supp. at 1424-26. Also shortly after the TRO, several incidents of blocking and harassing prompted plaintiffs to file motions for contempt against five defendants. Contempt charges were filed against Nancy Walker for trespassing, harassing patients, and impeding and hindering access at plaintiff Dr. Davis' clinic on November 29, 1990, and again at plaintiff Buffalo GYN Womenservices on December 1, 1990. (JA 79-101) Bonnie Behn and Carla Rainero were charged with harassing and stalking a patient the length of a city block and terrorizing her with a videocamera outside Womenservices on October 20, 1990. (JA 102-20) Petitioner Paul Schenck and Robert Schenck were charged with blocking cars and the doorway entrance at Womenservices on December 30, 1990. (JA 121-49)[3]

Defendants consented to keeping the TRO in effect until the court could resolve the contempt charges and hold a full hearing on plaintiffs' request for a preliminary injunction. On various dates between February and November 1991, the court held trials on these contempt charges, and this evidence became part of the record in support of the preliminary injunction. All

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[3] Subsequent to the preliminary injunction trial, but prior to the issuance of that order, Petitioner Schenck was again charged with violating the TRO at Womenservices on September 28, 1991. (R 124) When fashioning the preliminary injunction the district court had before it the sworn affidavits detailing the incident. These affidavits established that Schenck lay down in the street in front of plaintiff Dr. Slepian's car, preventing him from entering the driveway. After Dr. Slepian backed down the street, parked, and tried to get to the clinic on foot, Schenck rushed at him, trying to push others out of the way, in the process knocking down and injuring another anti-abortion demonstrator. After the contempt hearing, the court found Schenck in contempt. (R. 263)

five individuals were found, by clear and convincing evidence, to have violated the TRO on six occasions.[4] The court also held a preliminary injunction hearing during 11 days in March and April 1991. The court heard extensive testimony that despite the prohibitions on blocking and harassment in the TRO, defendants and other demonstrators, in numbers regularly ranging from 15 to 60 (Tr. 311-13), persisted in congregating in driveways and in front of doorways, physically and visually impeding use of the entrances. The court found, "the presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars...and creates a danger to both the occupants of the cars and the demonstrators themselves.... On some occasions, the drivers and occupants of the cars trying to enter the clinic parking lots are so intimidated and confused by the demonstrators that they leave the area thereby causing those occupants seeking health care to suffer a delay in obtaining such care." 799 F. Supp. at 1424.

The district court also heard testimony that despite the TRO, defendants continued to crowd around cars and pedestrians, frequently engaging in grabbing, pushing, shoving and yelling. The district court found that defendants forced "patients to run a gauntlet of harassment and intimidation," and that defendants' "activity causes stress and sometimes even physical injury to the patients, patient escorts, and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care." *Id.* These findings, which have never been challenged by Petitioners, and are amply supported by the testimony, are entitled to deference. *Madsen*, 114 S. Ct. at 2527.

a. Evidence of Blockades. Although defendants stipulated

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[4] The court also found that Petitioner Paul Schenck had given false testimony, and referred the matter to the U.S. Attorney. JA 136. Schenck was indicted by a grand jury, and pled guilty to making false statements under affirmation. 93 Cr. 285S (W.D.N.Y. 1993)



that mass blockades could be enjoined, and effectively conceded at trial that they had blockaded plaintiffs' health care facilities,[5] Petitioners imply that the stipulation and temporary abandonment of this one tactic of obstruction somehow renders irrelevant the numerous blockades suffered by plaintiffs. To the contrary, these blockades formed a crucial basis for plaintiffs' request for injunctive relief, and they color the entire context of defendants' persistent unlawful activities. For Petitioners to admit to their convictions and stipulate to blockades, and then to tell this Court that "there were no blockades" (Cert. Pet. 5), and to further argue that there is no record of obstructed access or illegal behavior (Pet. Br. 14, 30), is utterly disingenuous. The district court stressed that plaintiff health care facilities had been victims of blockades that stopped their operation on numerous occasions, 799 F. Supp. at 1424, and further found that the blockades particularly hampered law enforcement, thereby necessitating injunctive relief. *Id.* at 1426-27. Petitioners would also have this Court believe that other than blockades, all their activity was "peaceful protest." The record overflows with evidence to the contrary.

Witnesses described how several blockades shut down the clinics and risked serious medical dangers. During a blockade of Womenservices in October 1989, protestors laid down in front of cars, completely blocking the driveway and doorway entrances for several hours so "nobody could get through," including police cars and postal trucks. (Tr. 186, 437-38) During a 1988 blockade, Womenservices "was blockaded to the point for two days I could not get patients in at all." (Tr. 513) During one of many blockades at Dr. Press' medical office, demonstrators invaded the medical office building, completely blocking the stairways and hallways, so that a nurse "had to come in through the window." (Tr. 1000) A blockade at Dr. Wortman's left him "trapped in [his] office for about three hours," and he could not get out to go to the hospital

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[5] Defendants objected to blockade testimony, on the ground that their stipulation rendered it unnecessary.

to treat a patient with emergency acute post-hysterectomy bleeding. (Tr. 885-86)

b. Evidence of Obstruction and Other Unlawful "Constructive Blockade" Activity Before and After the TRO.

In addition to the full-fledged blockades, witnesses described in detail numerous other tactics defendants employed to persistently obstruct access to, trespass on or damage the plaintiff health care facilities. The district court called this range of activity "constructive blockades," because it achieved the same effects of obstruction, intimidation, and physical danger.

Defendants regularly congregated in the driveway entrances "milling and circling," moving very slowly, like they were "daring" drivers to hit them. (Tr. 83) Defendants repeatedly blocked driveways: They "would try and stop the cars, they would hang onto the cars, try and scream in the windows and just generally impede the progress of the car into the driveway.... [T]here were at least four or five on any given car." (Tr. 172-73). On a "typical" day, this conduct detained cars in the street for several minutes, or entirely prevented cars from getting in the driveways. (Tr. 393, 185-87, 519-20, 1235-36) Dr. Wortman testified that the driveways and entrances to his office were regularly blocked and obstructed "about twice a month," and that because of the narrow confines "usually two individuals can block one of those entrances quite easily." (Tr. 895)

Extensive testimony recounted how the throngs of demonstrators in or near the driveways made it impossible for drivers to see the entrances. In their confusion, drivers would circle around the block, missing the clinic entirely, or drive away to find a pay phone, or give up trying to get into the parking lots. (Tr. 152-53, 187-90, 221-22, 276, 344-48, 494; JA 130-31) Frequently, the defendants plastered literature or signs up against car windows, blocking the drivers' vision. (Tr. 276-77) On a number of occasions, defendants intentionally confused drivers by carrying erroneous signs marked "clinic parking" that actually



directed drivers *away* from the clinic parking lots. (Tr. 353-54) People thus unable to find or get into the driveways faced two dangerous choices: park on the street a block or two away and try to get to the clinic by foot, when they would be surrounded, jostled, and screamed at by protestors; or leave the area and forego the scheduled health care or try to reschedule for a later and medically more dangerous time. 799 F. Supp. at 1424, 1427.

Staff members at the plaintiff facilities testified how they were particularly singled out and blocked, or surrounded and screamed at regularly as they tried to enter the parking lots. (Tr. 519-20, 906, 983) For example, Susan Ward, a patient counselor at plaintiff Womenservices, testified that even after the TRO, she was blocked every day when she came to work. (Tr. 620-21) On a recent winter day, despite the TRO's prohibition on blocking, "I could not get into the driveway at all, I had to drive around the corner and climb over a snow bank and come around." (Tr. 621) Marilynn Buckham, Executive Director of Womenservices, testified that regularly being obstructed, badgered, and harassed while coming to work unnerved her and her staff and undermined the calm state of mind essential for providing health care. (Tr. 518-24, 704) Other health care personnel described the experience as being "terrorized" by the defendants, making it much more difficult to provide health care when agitated and "nerve-wracked" by these confrontations. (Tr. 618-19, 902-05, 982, 998, 1002)

There was also ample testimony about the dangers posed when driveways and adjacent sidewalks were obstructed. Witnesses described how confused and nervous drivers "get frightened and gun the engine and go whipping down the driveway. That is one of the things that...really scares us. We're afraid somebody is going to get hurt." (Tr. 353, 92-93, 190) Patient escort Sholes was clipped by a panicked driver whose visibility was blocked by defendants. In another incident a demonstrator pushed her, causing her to slip on ice and fall under a car trying to get in the driveway. (Tr. 343-44) On another occasion defendants placed their babies in strollers across the

driveway to block it, and approaching drivers' view was obstructed due to the phalanx of demonstrators lined up along the driveway edge; some of the helpless babies were nearly run over. (Tr. 344-45)

In addition to the constant clogging of entrances and swarming around cars, defendants repeatedly trespassed on the facilities, even after the TRO specifically enjoined such conduct.(Walker Tr. 228-29; Tr. 178, 295, 348-49, 352, 815-16, 881-83) Indeed, defendants admitted that they ignored the prohibitions against trespassing. (Walker Tr. 1058-61; Tr. 1405) At plaintiff Erie Medical Center, located in a medical office tower, defendants frequently trespassed into the building and blocked people trying to get into the elevator (Tr. 204-05, 238, 247, 295), or, despite the TRO, invaded the clinic's waiting room on the fifth floor. (Tr. 349, 352, 359) Dr. Wortman described a defendant who regularly followed patients into the building and elevator, refusing to let them off the elevator until he was physically separated from the patients. (Tr. 884-85) The very morning of his testimony, a defendant trespassed into his building and harassed his patients until the police were called. (Tr. 880-81)

Witnesses also described instances of anti-abortion demonstrators vandalizing the property at the clinics, including destroying medical equipment and instruments (Tr. 892); kicking in walls (Tr. 479); breaking entrance doors (Tr. 906); gluing, gumming up, or driving wood into the locks (Tr. 476-80, 550-52, 827, 836); rubbing a dead skunk around the doorway and leaving the carcass (Tr. 827); and defacing, ripping down, or throwing paint on signs indicating parking lot entrances (Tr. 473). Womenservices also had received bomb threats (Tr. 526), and doctors, clinic staff, and their families had received threats of death or bodily harm (Tr. 522-24, 986, 997-99).

Witnesses were emphatic that this obstructive and intimidating activity continued unabated *after* the TRO. Within a few weeks after the TRO, the frequency and intensity of defendants' obstructive and harassing activity returned to the



dangerous level of pre-TRO disruptions. (Tr. 63-66, 155-56, 177-78, 283-86, 312-13, 346-48, 35-60, 539-42) The Executive Director of Womenservices testified that after a two to three week period of calm following the TRO, defendants' obstructive and harassing conduct then "escalate[d] and [went] back to the way it was before the TRO...it was like they were flagrantly violating or questioning the TRO." (Tr. 540) When asked whether the TRO helped to keep the driveways clear or to keep patients from being surrounded by demonstrators thronging in their faces, clinic escort Warnes replied: "I have not seen anyone abiding by the rule for quite some time." (Tr. 178) Even after the TRO, she testified, defendants still blocked the driveway entrances "more regularly than not. They have slowed down to block cars, I've seen people lay in the driveway to block cars, I've seen them kneel in the driveway to block cars." (Tr. 185) Clinic escort Sholes recounted a conversation with Petitioner Dwight Saunders, in which he insisted that defendants had a right to congregate in the middle of the clinic driveways despite the TRO. Because of this attitude, she explained, "we have never been able to absolutely get the driveway clear." (Tr. 347) She described an incident only a week before the preliminary injunction hearing, in which a defendant demonstrated at Womenservices in violation of a city court order of protection. Upon her arrest, the remaining demonstrators "began to throng the driveway and...stop cars....When the cars stopped, they would knock on the window, or they would hold up the literature, or they would yell in the car. And the cars that did manage to get through...they would scream down at them." (Tr. 278) Linda Stadler, the office manager for Dr. Press, also testified that, despite the TRO, the driveway to his medical office was still regularly impeded and obstructed by milling demonstrators, and that defendants' screaming could still be heard by staff and patients inside the office. (Tr. 983-85, 1006-07, 1012) Several witnesses described Petitioner Paul Schenck's blatant post-TRO defiance of the prohibition on blocking and impeding. On December 29, 1990, Schenck laid his body against a car trying to

get into Womenservices' driveway, refusing to let it pass, "insisting that they stop and talk to him." (Tr. 92-93; *see also* JA 131). Schenck trespassed on Womenservices' private property in order to block the front door entrance with his body (JA 129-30), and pinned patient escort Warnes up against the door, trapping her and making her "hysterical" and "intimidated." (Tr. 184)

c. Evidence of Harassment, Crowding, and Intimidation by "Sidewalk Counselors." Testimony about the conduct of so-called "sidewalk counselors" demonstrates that while "sidewalk counseling" may begin as a relatively innocuous attempt to leaflet or to engage people in discussion, it usually escalates into a charged, threatening, invasively close harangue with the "sidewalk counselors" shouting directly into patients' faces.

Witnesses characterized encounters with sidewalk counselors as running a gauntlet of abuse, as being "surrounded" by people who get "very close physically" and scream. (Tr. 55, 174-75) Extensive testimony established that large numbers of demonstrators often surrounded their targets (Tr. 263-64, 280-81, 284-85), even though defendants' own witnesses acknowledged that being approached on the street by more than one stranger would be very intimidating. (Tr. 1262) Sholes described how sidewalk counselors, swarming around patients, effectively trap them: "They would surround the woman...it looked like a feeding frenzy. Because the woman would be absolutely vulnerable... engulfed by this large group of people. And it would be very difficult sometimes for them even to walk. They would be caught and be forced to stand and listen to all of this." (Tr. 282) The large number of demonstrators crowding around patients was "particularly frightening when the patient was on foot. We would be surrounded by people who were maniacal...in their fervor to get at this woman...It was getting very close, very physical. (Tr. 280-81) People arriving in cars are also terrified when they are "being mobbed by people on both sides of a car" and "many times they just plain don't get out of the car at all, and the people in the



car often are reduced to tears, because they are so frightened by who these people are that are surrounding their car." (Tr. 355) "Sidewalk counseling," according to witnesses, is "really an exercise in physical confrontation" (Tr. 290), which "all too often involve[s] pushing, shoving, grabbing, and in some cases fairly serious bodily contact between the patient and the sidewalk counselors." (Tr. 263-64) "Counselors" run "full tilt" to try to get at patients, shoving aside people and tripping, kneeing, or spitting on both the targeted patients and escorts. (Tr. 271, 290-92) One witness, accompanying a friend at Dr. Davis' office, was first trapped in her car and then crowded and screamed at throughout an entire parking lot by sidewalk counselors who ignored her repeated pleas to be left alone. She described the experience as "like being in the middle of a lynch mob." (Walker Tr. 31-32)

Notably, witnesses emphasized that the message yelled by sidewalk counselors has nothing to do with the terrors and dangers: "The content of the message is not even the issue. It's the sheer proximity of total strangers getting in your path...and shouting at [patients] and the whole thing is very frightening. [Women are] so frightened [when] it's a group of strange men who have suddenly come out of nowhere and surrounded them,... following them, badgering them." (Tr. 300) The particular risks to some women patients from being surrounded by unfamiliar men were dramatically illustrated by clinic counselor Susan Ward. She described a rape victim patient "accosted" by men out on the street who followed her after she asked to be left alone, and "when she did not want to accept brochures, they grabbed her arm and tried to tuck them under her sleeve." (Tr. 625) "She was terrified [and] the fact that she was touched...and that people tried to stop her from coming in, she required a good part of the day" to be calmed down enough to have surgery. (Tr. 614-15)

Not surprisingly, given this aggressive activity, witnesses relayed several incidents where physical violence erupted as a result of the excessive pursuit by sidewalk counselors, including after the TRO. (Tr. 272) In one incident, a sidewalk counselor at

Erie Medical Center assaulted an employee of the medical building and knocked her into a trash barrel. (Tr. 273-74) On another occasion at Erie Medical Center, a young woman getting out of her car was pushed by a sidewalk counselor, causing her to slip and fall on the ice and sprain her ankle. The patient's male companion became enraged, and started punching the sidewalk counselors. (Tr. 303, 397-98) Witnesses also described other actual or incipient fist-fights, because the persistent refusal of the "counselors" to leave people alone made the targets so angry that escorts had to pull them away to keep them from hitting the sidewalk counselors. (Tr. 180)

Witnesses underscored that "sidewalk counselors" rarely respect a target's request to be left alone, but rather walk right alongside, "brushing against them," "getting louder and louder." (Tr. 55-58, 60, 263) Once a target refuses the entreaties of sidewalk counselors, it becomes an "insistent and persistent sort of pursuit," stalking patients and "yelling" at them for "long distances, several hundred feet along the sidewalks or through parking lots. " (Tr. 263; *see also* JA 84-88, 95-98, 107-09, 116-17) The request of a target to be left alone is usually what escalates the encounter: When "the patients will not stop and talk to them, they get more and more frustrated and angry and their tones get louder and louder." (Tr. 60; Walker Tr. 31-32) Defendant Nancy Walker, a particularly abusive sidewalk counselor, acknowledged that virtually nothing would make her leave people alone (Walker Tr. 1087-88), and when people did ask her to leave them alone she screamed at them that "they had no right" to make her stop. (Walker Tr. 515, 559) Walker and other defendants would frequently continue their screaming right up to clinic doors, even using bullhorns right up against the glass. (Tr. 176)

Witnesses also testified that the TRO's prohibition of tortiously harassing patients, and its requirement that they let those who refuse "counseling" walk away, had almost no effect on the abusive aggression of sidewalk counselors. A couple of weeks



after the TRO, they soon returned to the previous levels of intensity and danger, and also regularly violated the two-person limit within the 15 foot zone. (Tr. 177-78, 271-72, 283-84, 347-48, 359-63, 540-42) Even when defendants were arrested for harassment, they were not deterred. (Tr. 422-27)

d. Evidence of Medical Risks from "Constructive Blockades" and Pursuit by "Sidewalk Counselors." Petitioners have never challenged the district court's findings, based on substantial and uncontradicted testimony, that their actions caused medical harm and disrupted the atmosphere necessary for safe health care. Witnesses described at length how patients are traumatized by their unwanted encounters with crowding demonstrators and invasive sidewalk counselors who refuse to leave them alone. Patients were described as infuriated, agitated, fearful, terrified by the demonstrators' cameras, tense, sobbing, and hysterical. (Tr. 487-91, 497-98, 500, 506, 616-17, 819-21, 828-29, 900, 990, 1003) The physical and emotional stress reactions to aggressive face-to-face encounters make it more difficult to prepare patients for surgery, and draw out the procedure because patients require extra time to calm down sufficiently. Moreover, when patients are extremely upset, they cannot hear and absorb crucial medical instructions. (Tr. 499, 609-10, 616-17, 819-21, 896-900) Frequently, patients are so agitated and stressed that they thrash around or tense up on the operating table, so that the sharp surgical instruments cannot safely be inserted. (Tr. 506-09, 610, 615-16, 821) The extreme stress produced by the invasive behavior of the anti-abortion protestors causes some patients to hyperventilate, dangerously elevates blood pressure, sends some asthmatic patients into respiratory arrest, and makes women with morning sickness start vomiting, risking dehydration. (Tr. 487-91, 506-09)

Witnesses recounted several patients so distraught from being accosted by sidewalk counselors and from being "hollered at in their face" that they could not safely undergo surgery. (Tr.

612-16) One patient was undergoing a two-day abortion procedure, which involves inserting a cervical dilation device, called a laminaria, on the first day. On that day, the patient encountered no protestors or sidewalk counselors, and she was calm and easily accepted the laminaria insertion. On the next day, however, she was badgered, crowded, and followed by sidewalk counselors, and was so upset that despite several attempts to calm her down, each time the doctor tried to insert the speculum she started thrashing about. If a laminaria is not promptly removed, severe infection or hemorrhage results. Consequently, this patient had to be rushed to a hospital and put under general anesthesia to complete the surgery. (Tr. 612-13) Other patients were so agitated they had to reschedule their surgery, which increases the medical risks because a later term abortion is a more complex and riskier surgical procedure. (Tr. 501-03, 896-98, 1003) When rescheduling is not a viable medical option or is not possible because the patient has traveled a great distance, the physician must try to overcome the extreme agitation by using general anesthesia, "which imposes an additional medical risk over a pregnancy termination." (Tr. 900-01) Some women are so distraught by their encounters with protestors that they refuse to come in for their post-surgical follow-up care, so they cannot be evaluated and treated for complications. (Tr. 737, 901-02)

Each of the witnesses emphasized that these adverse medical effects are due to the abuse from the anti-abortion protestors, and not from the anxiety of the surgery itself. They contrasted the relatively calm, alert state of patients on days when protestors are not present, with the distraught, thrashing women they had to attempt to treat on days when virulent protestors were present. (Tr. 492-93, 510-12, 618-19, 819-21, 900-02)

Abortion patients are not the only ones put at medical risk. Dr. Wortman testified that on Saturdays, when protestors are "always" there and his patients are "guarantee[d]...a certain amount of harassment," 60% of his patients are there for obstetrical or gynecological reasons other than abortion. (Tr. 899)



Dr. Alice Hoagland, a clinical psychologist whose office was in the same hospital as plaintiff Highland Obstetrical Group, described her psychiatric patients being accosted by anti-abortion demonstrators, and suffering treatment-hampering trauma from "being harassed, having proselytizing people around them, being yelled at,...having their pictures taken, not being able to walk in a direct line in order to get to their appointment, and feeling threatened." (Tr. 773-74, 733-35, 738-39, 741) For some patients, particularly cancer patients, the stress induced by entering this Rochester hospital through the gauntlet of abusive protestors created "life-threatening situation[s]." (Tr. 737)

Dr. Hoagland's testimony was particularly instructive about the physical risks of intrusively close encounters with strangers. An expert in how social stress influences medical treatment (Tr. 720-23), and "social impact theory," which pertains to the physical and psychological effects of having one's sense of personal space encroached (Tr. 743-51), Dr. Hoagland testified that exposure to a stressful or onerous situation surrounding medical care, such as being accosted by demonstrators, decreases the ability of patients to understand and comply with medical instructions, and also increases the likelihood of refusing to obtain follow-up care. (Tr. 724-25, 736) Dr. Hoagland also explained the actual physiological reactions to experiencing stress. Academic research establishes that people have an acute sense of personal space, which varies according to the setting of an encounter, the intimacy with the person encountered, and the perceived supportiveness. (Tr. 742-45) Intrusions by strangers into one's personal space is an extremely stressful situation. If one is already feeling anxiety or stress, as from upcoming surgery, and a stranger perceived as unsupportive intrudes too close, the preexisting psychological state is exacerbated, and there can be dramatic physical arousal. (Tr. 745, 789-90)

Stressful encounters, particularly just before surgery, can create an immunosuppressive response, which increases the risk of infection and post-surgical complications. (Tr. 740) The situation

presented by anti-abortion demonstrators was a "worst case scenario" for these risks, because of the demonstrators' loudness, unwelcomeness, hostility, and proximity in large numbers. (Tr. 744) Even two demonstrators coming very close, such as 5 feet away from a person, could be an extreme physical stress factor. A larger number of demonstrators as much as 25 feet away from a medical patient could also be a significant adverse stress factor, particularly if they are loud and perceived as hostile. (Tr. 748-51) Dr. Hoagland testified that increasing the physical distance by putting "a bubble" between loud intrusive people and their targets would alleviate the adverse physical and psychological stress effects. (Tr. 804) Defendants' tactic of pointing videocameras at patients exponentially elevates the stress, particularly for people seeking private, confidential treatment, such that even a single demonstrator 15 feet away presents a "medically intolerable" situation. (Tr. 751-53)

e. Modifications of the TRO Adopted in Preliminary Injunction to Respond to the Evidence. Faced with the evidence of the history of illegal blockades; vandalism; harassment; criminal convictions that did not deter defendants; substantial medical risk; continued blocking, impeding, crowding, and harassing patients and staff in defiance of the TRO; and the demonstrated ineffectiveness of local criminal law and the TRO in securing safe access to the targeted health care facilities, the district court entered a preliminary injunction that contained important modifications of the TRO. These modifications added most of the provisions Petitioners now challenge. The court noted that the new injunction was "more comprehensive in order to cover the full range of defendants' activities. [It] is better tailored to the evidence and addresses not only physical 'blockades,' but other 'rescue' activities as well....including: obstructing and impeding access...congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving



or interfering with patients and staff as they approach the clinic on foot." 799 F. Supp. at 1433-34.

For these reasons the district court added in ¶1(b) a 15 foot buffer zone around driveway and doorway entrances, and a 15 foot clear zone around cars trying to enter or leave the facilities.[6] The court determined that 15 feet was the approximate length of a car, and thus its safe turning radius. (R. 13) These provisions were directly responsive to the fact that the TRO's general prohibition on blocking and impeding, and its prohibition on demonstrating within 15 feet of people seeking access, had not kept the driveways and doors clear, nor had it prevented pedestrians and vehicles from being surrounded, crowded, and impeded. The district court also noted that these "clear zones" are "necessary to ensure that people and vehicles seeking access to the clinics will be able to determine readily where the entrances are located [and] the clear zones will prevent defendants from crowding patients and invading their personal space." 799 F. Supp. at 1434.

While the preliminary injunction continued to allow two "sidewalk counselors" to enter these buffer zones and attempt face-to-face engagement, the court also added a clarification to sidewalk counselors' obligation in ¶1(c) to "cease and desist" when the targeted people verbally or non-verbally indicate that they do not want to be counseled. In response to the evidence that rebuffed sidewalk counselors continued to brush right up against their target and badger them, the order specified that when rejected "sidewalk counselors" must retreat to the 15 foot clear zone distance.

2. ***Proceedings in the Second Circuit***

Petitioners Schenck and Saunders appealed the preliminary injunction, and the Second Circuit panel unanimously upheld all

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[6] The full text of the preliminary injunction appears at 799 F. Supp. at 1440; 67 F.3d at 393; at Cert. Pet. App. A-33, and again at A-182.

but two provisions. By a 2-1 vote the panel struck down the 15 foot buffer zones in ¶1(b), and the requirement to "cease and desist" from unwanted "sidewalk counseling" in ¶1(c). *Pro-Choice Network v. Schenck*, 67 F.3d 359 (2d Cir. 1994). Plaintiffs sought rehearing *in banc* on these two provisions only, and by a 13-2 vote the entire Second Circuit vacated those portions of the panel decision and affirmed the entire preliminary injunction. *Pro-Choice Network v. Schenck*, 67 F.2d 377 (2d Cir. 1995) (*in banc*). Judge Oakes, writing the opinion of the court, thoroughly canvassed the factual findings and upheld the injunction in light of the facts and the *Madsen* requirement that injunctions restrict "no more speech than necessary" to serve significant governmental interests. Noting the factual similarities between this record and the *Madsen* record, *id.*at 388, the court held that the same significant governmental interests supporting the injunction approved in *Madsen* -- medical safety, public safety, and access to abortions -- were at stake here. *Id.* at 387. The court concluded that the buffer zones and "cease and desist" provisions were necessary to "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." *Id.* at 391-92. They burdened no more speech than necessary because they allowed defendants complete expressive activities "in full view of people going into the clinic or just passing by," and they allowed "individualized face-to-face communication with persons entering the clinics," and did not restrict the message, but "only [defendants'] intimidating method of demonstration. *Id. at 389.*

## SUMMARY OF ARGUMENT

This case starkly dramatizes the problems posed to law and order when a passionate mob is intent on preventing other people from exercising their constitutional rights, or intimidates and harasses them for doing so. Petitioners and their co-defendants engaged in a two year series of blockade sieges of plaintiff health



care facilities. When the criminal law failed to deter defendants and prevent imminent serious risks to health and public safety, the district court entered a TRO which exhorted defendants not to block or impede access to or egress from the medical institutions. But the TRO also proved insufficient to protect plaintiffs' facilities. Several defendants wilfully violated the TRO and faced contempt sanctions. In addition, the evidence showed that patients and staff continued to suffer obstruction, intimidation, and harassment. After hearing extensive evidence of this ongoing unlawful conduct, in a third attempt to secure order and protect the significant governmental interests jeopardized by defendants' campaign, the district court entered the challenged preliminary injunction. The injunction clearly is not a prior restraint.

The injunction's restrictions are content neutral, entered in response to defendants' proven unlawful conduct, and designed to provide medically vulnerable individuals with some modest breathing space to shield them from aggressive physical encounters. Under this Court's test in *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), the injunction burdens no more speech than necessary. The injunction leaves Petitioners free to express any message they wish to their targets; Petitioners merely must respect a modest clear zone of 15 feet around entrances, cars, and people. These clear zones correspond to the approximate length of a car and to the medically established zone of personal space necessary to reduce health-threatening physical stress. They are essential to secure significant governmental interests in ensuring safe and private conditions for medical care, and maintaining public safety and the free flow of traffic. These are the same governmental interests deemed sufficient in *Madsen* to support appropriately tailored injunctive relief.

The challenged injunction provisions are narrowly tailored to the record and burden no more speech than necessary to secure these governmental interests. The 15 foot clear zones and the requirement that "sidewalk counselors" must "cease and desist" from unwanted face-to-face targeting by backing away 15 feet

directly respond to defendants' proven conduct: congregating in driveways and across doorways, physically obstructing and visually obscuring them, risking vehicle accidents and physical injury; swarming around people as they attempt to enter the medical facilities, impeding, grabbing, brushing up against them, yelling in their face, and intimidating them to the point they have to forego or delay health care. This conduct regulated by the preliminary injunction is all independently proscribable as tortious or criminal harassment, assault, intentional infliction of emotional distress, or disorderly conduct. The clear zones and "cease and desist" requirement allow defendants to remain on the sidewalks adjacent to the targeted facilities, fully visible and audible to their targets and to passersby. Moreover, they afford Petitioners the opportunity to engage people face-to-face, so long as Petitioners do not abuse this opportunity by refusing to accept people's pleas to be left alone.

Indeed, the right to be let alone is central to this case. All citizens have a right, protected by the First Amendment, to refuse unwanted messengers, and to go about one's business without an unwelcome speaker dodging one's footsteps, shoving literature on one's body or grabbing and screaming. The evidence compellingly supports the district court's finding that defendants, with their aggressive and loud conduct, effectively hold people captive. Because Petitioners have no right to foist themselves on unwilling targets, the clear zones and "cease and desist" clause are essential to protect the right to be let alone.

Unfortunately, the modest restrictions in the preliminary injunction have proven insufficient for curbing Petitioners' unlawful and dangerous conduct. Defendants have again resorted to mass blockades, and their harassment campaign targeted at clinic staff and patients continues unabated. Because of many intervening events in the past four and one half years, the preliminary injunction has become stale. This Court should dismiss the writ as improvidently granted to enable the district court to fashion injunctive relief tailored to the current exigencies.



## ARGUMENT

### I. Under the Factual and Legal Framework of *Madsen*, the Challenged Portions of the Preliminary Injunction Must Be Affirmed.

This case bears a striking similarity to *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994). It grows out of the same national campaign to disrupt abortion services, and its facts of ongoing obstructive tactics that endanger health care are notably evocative of those found sufficient to warrant a buffer zone in *Madsen*. Nevertheless, Petitioners continue to press several legal arguments rejected by this Court only two years ago. *Madsen* readily dispenses with these arguments.

#### A. *Madsen* Instructs That This Preliminary Injunction is Content Neutral and Not a Prior Restraint

Although *Madsen* rejected the argument that all injunctions that touch on First Amendment activity must be analyzed under the prior restraint doctrine, *id.* at 2524 n.2, Petitioners reassert that point here. Their argument, notably devoid of analysis of either the facts or the very limited nature of the injunctive restrictions, simply repeats the very claim rejected in *Madsen*.

As this Court noted, "[n]ot all injunctions which may incidentally affect expression ... are 'prior restraints.'" *Id.* Prior restraint analysis is inapplicable when the injunction is a remedial measure entered in response to prior or threatened imminent unlawful conduct, and when rather than preventing those enjoined from expressing their message altogether, it only limits the place and manner with a modest buffer zone. *Id. See also Lawson v. Murray*, 115 S. Ct. 2264 (1995) (Scalia, J., concurring with denial of writ of certiorari) (agreeing that injunctions issued as remedy for prior or threatened legal wrongs are not prior restraints).

Prior restraint analysis is particularly inapposite here. The preliminary injunction was a *subsequent* response to lawlessness; it was, in fact, the third attempt to preserve order, public safety, and medical safety. Initially, the state resorted to generally applicable criminal laws to attempt to punish and curb defendants' illegal actions. When this failed, and defendants again announced they would blockade, the court intervened. The TRO was the second level response to defendants' demonstrated propensity to violate legal norms. But, as the district court found, arrests and convictions had not deterred defendants, and unlawful activity such as obstructing ingress and egress to the plaintiffs' facilities, trespass, and crowding, grabbing, pushing, and intimidating patients and staff continued unabated after the TRO. 799 F. Supp. at 1424-25, 1434-35. Thus, when the TRO's attempt at prophylaxis also failed, truly the last line in defense of the rule of law was for the district court to order the modified restrictions in the preliminary injunction. In this situation, it would be dangerous for this Court to second-guess the district judge's well-informed assessment of the sort of restrictions necessary to prevent order and reduce medical risk.

Unlike the wholesale bans on publication or leafletting found to be prior restraints in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the preliminary injunction here, like the order in *Madsen*, merely prevents Petitioners from congregating, obstructing, and harassing patients in a small 15 foot buffer zone, roughly the length of a car. Even more solicitous of Petitioners' expressive interests than the buffer zone in *Madsen*, it allows two "sidewalk counselors" to leaflet and converse face-to-face within the buffer zone, until their target refuses further unwanted communication. Upon such a refusal, they must only back away 15 feet, where they can continue a full range of expressive activity.

*Madsen* also establishes that this preliminary injunction is content neutral. Nothing in the order refers to the content of



Petitioners' message -- it is directed at their proven conduct of obstructing, impeding, crowding, badgering, and harassing. 799 F. Supp. at 1432-33. As one witness emphasized, the message is irrelevant to the distress caused; rather, "it's the sheer proximity of total strangers getting in your path and shouting." (Tr. 301) The injunction's aim is not to protect patients from offensive messages, but from documented, uncontradicted serious psychological and physical distress. 67 F.3d at 386; 799 F. Supp. at 1428, 1433-34.

### B. The Identical Governmental Interests at Stake in *Madsen* Are Implicated Here.

In pressing their insupportable prior restraint argument, Petitioners disparage or ignore the governmental interests supporting this preliminary injunction. Pet. Br. 25-29. Yet the significant governmental interests supporting the challenged provisions track the interests deemed significant in *Madsen*. The courts below found that the government has a significant interest "in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." 799 F. Supp. at 1433; 67 F.3d at 387 (quoting *Roe v. Wade*, 410 U.S. 113, 150 (1973)); *cf. Madsen*, 114 S. Ct. at 2526 (interest in protecting "not only the psychological, but the physical well-being" of patients). The injunction here, like that in *Madsen*, also "effectuates the significant governmental interest of public safety" and the free flow of vehicular and pedestrian traffic. 799 F. Supp. at 1433; 67 F.3d at 387; *accord Madsen*, 114 S. Ct. 2526. The lower courts also found the injunction necessary to ensure that women's constitutional right to seek abortion services was not "sacrificed in the interest of the constitutional rights of another" group. 799 F. Supp. at 1433; 67 F.3d at 387; *accord Madsen*, 114 S. Ct. at 2526 ("The State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy.").

Just as this Court in *Madsen* emphasized the strong

governmental interest in ensuring quiet and tranquility around medical facilities, 114 S.Ct. at 2528, the district court noted that "in crafting the preliminary injunction," it was "guided by the paramount need to maintain an atmosphere conducive to the health care function of plaintiffs' facilities. ... Defendants' noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting. The significant governmental interest inherent in providing safe medical care justifies certain carefully drawn restrictions on defendants' expressive activities." 799 F. Supp. at 1433. *See also NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 n.12 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978); *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) (government has power "to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of buildings that require peace and quiet to carry out their functions, such as hospitals").

### C. The Record Supporting the Injunction in This Case is Remarkably Similar to, and in Some Respects Stronger than the Record in *Madsen*.

The record supporting the current injunction is strikingly similar to the record deemed sufficient in *Madsen*. In some respects, such as adjudicated contempt violations and a history of criminal convictions and blockades, it is stronger. Here, as in that case, there was a prior order that proved insufficient, despite prohibiting blocking and impeding access, and tortious harassment. Witness after witness emphasized that after the TRO, defendants still regularly obstructed the driveways and doorways by congregating in them, and by crowding around cars and grabbing, pushing, and shoving people trying to enter or leave. The large numbers of demonstrators milling in and around the driveways either stopped or slowed cars, or so confused the drivers that they could not find the entrances and left the area. Demonstrators



crowded around patients and other pedestrians, including those seeking non-abortion medical care, "like a feeding frenzy" and "trapped them and forced them to listen." Tr. 282; 799 F. Supp. at 1423-27; *cf. Madsen*, 114 S. Ct. at 2521. Defendants admittedly also flouted the TRO's ban on trespass. *See* p.10, *supra*. The ban on tortious harassment was also routinely ignored, as defendants often screamed at, crowded, and continued to follow those hapless individuals who begged to be left alone. 799 F. Supp. at 1424-25.

The record of continuing unlawful behavior in this case is stronger than in *Madsen*. All defendants here, by their own admission, had been arrested and convicted for their illegal conduct at plaintiffs' health care facilities, yet were undeterred. Some defendants, including Petitioner Paul Schenck, were found by clear and convincing evidence to have wilfully violated the TRO's prohibitions on blocking and impeding, trespassing, and harassing. JA 144; R. 263. In contrast, there were no adjudicated contempt proceedings in *Madsen* before the Florida court added refined injunctive provisions.

The long history of mass blockades at plaintiffs' facilities also elevates this record above that in *Madsen*: While the plaintiffs here had been besieged by 18 "blockade" events over a two year period before the district court issued injunctive relief (JA 52-56), the *Madsen* defendants stipulated that they had never previously blockaded clinics in that area. *Madsen* R. 65, cited in Brief Amicus Curiae of the United States of America submitted in *Madsen v. Women's Health Center* at 3. Moreover, the type of obstructive activity that prompted the state judge in *Madsen* to fashion the buffer zone restriction upheld by this Court appears, from the description in that record, to have constituted what the district court here characterized as "constructive blockades." The actions that led to the modified Florida injunction consisted of large numbers of protestors crowding the street, "mov[ing] in a steady stream across the Clinic driveway [where] [t]heir presence caused cars entering the clinic property to slow or stop entirely. As the cars slowed, a cadre of protestors swarmed around them,

shoving literature into the cars' windows and, pressing close to the cars, screaming invective." Brief for Respondents in *Madsen* at 4 (citing *Madsen* JA 265, 266, 542); 114 S. Ct. at 2521; *cf.* 799 F. Supp. at 1424-25 (description of "constructive blockade" activity).

### D. *Madsen* Does Not Require Failure of a Prior Less Restrictive Injunction, Even Though That is Precisely the Situation in This Case.

Petitioners incorrectly contend that *Madsen* mandates that no injunctive speech restrictions can pass First Amendment scrutiny unless the court, in response to pervasive illegal conduct, first imposed narrower prohibitions that failed to protect the governmental interests. (Pet. Br. 30) This argument is unavailing here. The district court did enter a less restrictive TRO in response to evidence of persistent prior unlawful conduct and defendants' announced intention imminently to engage in another illegal blockade. Defendants then admitted their past illegal behavior, agreed to the continuation of the TRO, and further stipulated that blocking, impeding, and obstructing access and egress could be enjoined. Despite their stipulation, they -- and Petitioner Schenck especially -- continued to engage in this very conduct. Petitioners have no grounds now to complain about the justification for the original or subsequent restrictions on their conduct.

Petitioners misread *Madsen* when they assert that it mandates initial resort to a non-speech restrictive injunction, no matter what the evidence of criminal and tortious obstructive and harassing conduct and irreparable injury before the court. *Madsen* simply enumerated that the failure of an initial order "to accomplish its purpose" was one factor that "*may* be taken into consideration in evaluating the constitutionality of the broader order." 114 S. Ct. at 2527 (emphasis added). It would be dangerously unwise to elevate this factor to a litmus test. Judges must retain flexible equity powers to respond to the full range of evidence before them, to proscribe not only the "precise conduct



previously pursued," but "to eliminate its consequences" and demonstrated harms. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978).

For example, if a district court hears evidence of the caliber presented in this case, that demonstrators congregating near a driveway obstruct it from view and make it more dangerous for cars to try to enter, that court should be able to fashion a modest clear zone in order to clear the entrance both visually as well as physically. To bind a district court's hands with a rule that all it can do when it knows that a clear zone is necessary to secure safe access is wait for the inevitable failure of a less restrictive injunction "would be a wastefully iterative and risky exercise." 67 F.3d at 375 (Oakes, J. dissenting). Similarly, a district court should have flexibility to fashion a limited bubble around people when presented with evidence that protestors are persistently invading personal space in an intimidating and dangerous manner. It is particularly important to preserve flexibility in the health care context, where conduct other than physically blocking and trespassing can disturb the non-threatening atmosphere essential for reducing medical risks. "While the district judge waits for the injunction to prove ineffective, patients may well continue to suffer the extreme stress and anxiety that causes the increased health risks." *Id. See also NLRB v. Baptist Hosp. Inc.*, 442 U.S. 773, 783-84 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505-07 (1978) (upholding initial resort to complete bans on union leafletting in areas where patients gather); *Frye v. District 1199, Health Care & Soc. Servs. Union*, 996 F.2d 141 (6th Cir. 1993) (initial injunction with 25 foot buffer zone around nursing home driveways plus limits on number of picketers and hours for picketing necessitated by healthcare interests).

## II. The First Amendment Grants No Privilege To Invade Personal Space and Force One's Invasively Close Physical Presence on Unwilling Targeted Individuals.

In assessing whether the challenged injunction provisions "burden no more speech than necessary" to protect significant government interests, this Court must keep in mind two important First Amendment principles: 1) "the right of every person to be let alone must be placed in the scales with the right of others to communicate," *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); and 2) face-to-face importuning and picketing focused on vulnerable individuals who cannot easily avoid it present risks of duress and coercion that may appropriately be regulated. *Madsen*, 114 S.Ct. at 2527, 2529; *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992); *Frisby v. Schultz*, 487 U.S. 474, 486 (1988). The right to be let alone and to refuse unwanted messengers is of equal First Amendment importance to the right to speak because both flow from the interest in personal autonomy and freedom of thought. *Public Util. Comm'n v. Pollack*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) ("To think as one chooses, to believe as one wishes are important aspects of the constitutional right to be let alone.").[7]

The First Amendment principle at stake is not, as Petitioners insist, whether speech can be completely banned on a public sidewalk. The 15 foot buffer and bubble zones and the "cease and desist" requirement neither remove Petitioners from the sidewalks adjacent to the health care institutions nor curtail their vigorous sidewalk protest; they merely limit Petitioners' proven tortious conduct of impeding entrances, invasively crowding and

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[7] These rights also rest on interests in repose and tranquility, privacy, and avoiding emotional and physical distress. *Frisby*, 487 U.S. at 477, 484-85; Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 Hastings Const. L. Q. 85 (1991). *See also* Anne D. Lederman, *Free Choice and the First Amendment: Or, Would You Read This If I Held It In Your Face and Refused to Leave*, 45 Case Western L. Rev. 1287 (1995); Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U. L. Rev. 153 (1972).



stalking people, and physically and mentally badgering those who have rejected their "counseling." As the district court found, defendants' unbridled conduct threatened to overwhelm patients' countervailing constitutional rights to obtain legal medical services, and their First Amendment right to reject unwanted speakers. 799 F. Supp. at 1433, 1435-36. Thus, the question here is whether an invasive "in your face" manner of protest directed at medically vulnerable people at health care locations, whose well-being requires a calm, stress-free atmosphere, can be regulated by narrowly tailored zones that preserve personal space and clear entrances.

As Petitioners acknowledged in the court below, their entire position rests on an insistence that they have a right to "speak in somebody's face [even] once that person has said go away." Second Circuit *In banc* Oral Argument Tr. at 13. This proposition has consistently been rejected in First Amendment jurisprudence. The First Amendment does not guarantee the right to communicate one's view to anyone at all times and in any manner. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). As this Court has often emphasized, "[n]othing in the Constitution compels us to listen to or view any unwanted communication," and there is no "right to press even a 'good' idea on an unwilling recipient." *Rowan*, 397 U.S. at 737-38; *Frisby*, 487 U.S. at 485. The venerable First Amendment right to distribute literature extends only to those "willing to receive it." *Schneider v. State*, 308 U.S. 147, 162 (1939). Nor can speakers "insert a foot in the door and insist on a hearing," *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949), or "cordon off [an] entrance to a public or private building ... and allow no one to pass who [does] not listen to their exhortations." *Adderley v. Florida*, 385 U.S. 39, 48 n.7 (1967); *Cox v. Louisiana*, 379 U.S. 555 (1965).

The need to protect the right to be let alone is particularly compelling under the factual circumstances here. Defendants persistently intrude into personal space of people entering health

care facilities in an obstructive, intimidating, and physically risky manner. *Cf.* Findings at Schenck contempt trial (blocked car and insisted occupants take literature, JA 131, and stood across doorway so no one could pass without encountering him, JA 129-30); findings at Walker contempt trial (crowded around vehicle and made it difficult for occupants to exit until they took literature, JA 84; with "loud and invasive behavior" kept yelling at people or closely following and brushing up against them, despite requests to leave them alone, until one targeted women "broke down into tears and started to sob." JA 84, 86-89); findings at Behn/Rainero contempt trial (pursued young woman, forcing speech and video camera on her, ignored her pleas to be left alone, to the point she "became increasingly upset and began crying, whimpering and shaking." JA 108-09). When defendants stalk and harangue patients, ignore their requests to be left alone, and terrify them by zeroing in with videocameras, 799 F. Supp. at 1424-26, "substantial privacy interests are being invaded in an essentially [and medically] intolerable manner," *Cohen v. California*, 403 U.S. 15, 21 (1971). *See* testimony of Dr. Hoagland, Tr. 751-52. *Cf. New York State NOW v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (There is no First Amendment right to demonstrate "in close proximity to individual women entering or leaving clinics so as to tortiously harass them or to invade another's personal space.") Thus, the government's interest in securing the First Amendment right to be let alone and to refuse unwanted speakers provides additional support for the challenged provisions.

The preliminary injunction fully secures Petitioners' First Amendment right to attempt to engage with their desired targets and to approach them in a non-threatening manner at particular sites. But Petitioners have no right to abuse the privilege of targeted protest, as they have done here, and turn it into an instrument for intimidating and inflicting psychological and physical harm on vulnerable medical patients. Indeed, the facts of this case starkly illustrate why this Court has frequently expressed



concern that targeted protest and face-to-face encounters present risks of duress and coercion. *Madsen*, 114 S. Ct. at 2527, 2529; *Lee*, 505 U.S. at 683-85; *Frisby*, 487 U.S. at 486.[8] As Justice Stevens noted in *Frisby*, when picketers engage in such conduct, they are "obviously intend[ing] to do more than convey a message [they are] intend[ing] to cause substantial psychological distress." *Id.* at 498 (Stevens, J., dissenting.)

When targeted protest turns into invading others' personal space by walking beside and brushing up against them, following or surrounding them and foisting proximity, unwelcome messages, and frightening, privacy-invading video cameras on people begging to be left alone, all pretense to advancing the marketplace of ideas breaks down. Such conduct is pure intimidation, coercion, and harassment. "[T]here is no right to invade the personal space of individuals going about their lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion." 67 F.3d at 396 (Winter, J., concurring). This conduct is independently proscribable as tortious or criminal assault, harassment, disorderly conduct, and intentional infliction of emotional distress. *See, e.g., Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (shadowing and photographing Jackie Onassis and her children without their consent constitutes tortious

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[8] In *Lee*, these risks, plus littering, pedestrian congestion, and the possibility that unwanted encounters with "harried or hurried travelers[s]" could cause delay in catching planes, were sufficient, in the view of four members of this Court, to sustain a *total* ban on leafletting in airports, even when "a busy passenger ... [could] fend off a leafletter with minimum disruption to himself." 505 U.S. at 831-32 (Rehnquist, C.J., White, J., Scalia, J., and Thomas, J., dissenting). Thus, surely in this case, where unwanted encounters risk delayed surgery and elevated health risks, the limited buffer between patients and demonstrators, which permits two defendants to attempt face-to-face leafletting until rebuffed, and does not ban picketing at the chosen site, is sufficiently tailored to protect First Amendment interests.

and criminal harassment under N.Y. law and thus not protected by First Amendment); *City of Fargo v. Brennan*, 543 N.W.2d 240, 244 (N.D. 1996) (aggressively invading zone of personal space and waving arms at targeted person is physically intimidating, threatening and unprotected criminal conduct); *People v. Calvert*, 629 N.E.2d 1154, 1158-59 (Ill. App. 1994) (criminal harassment and assault for cornering individual and verbally abusing her, screaming in her face and jabbing finger at her); *Van Duyn v. Smith*, 527 N.E.2d 1005 (Ill. App. 1988) (tort of intentional infliction of emotional distress found based on facts very similar to present case), *cert. denied*, 492 U.S. 906 (1989); *People v. Blackwood*, 476 N.E.2d 742, 746 (Ill. App. 1985) (man prosecuted for violating domestic violence protective order when he came invasively close to wife and yelled epithets at her; court holds this form of expression "not subject to constitutional protection under any circumstances"); *State v. Lilburn*, 875 P.2d 1036 (Mont. 1994), *cert. denied*, 115 S. Ct. 726 (1995) (rejecting First Amendment challenge to harassment conviction for impeding and interfering with hunter); *Flamm v. Van Nierop*, 291 N.Y.S.2d 189 (Sup. Ct. 1968) (torts of assault and intentional infliction of emotional distress from stalking plaintiff by driving behind him at dangerously close range, walking closely behind or beside him in public while grimacing and leering at him).

Dr. Hoagland's expert medical testimony in this case, documenting the physical and psychological basis for a safe zone of personal space, *see* pp.17-18 *supra*, highlights the importance of this Court's recognition of the need to shield people from intrusively close targeted protest. This testimony is supported by a growing body of social science research which establishes that the comfortable zone of personal space for interactions among strangers in public is 8 to 12 feet or more, depending on numbers, loudness, and perceived unfriendliness. Violations of this social distance cause physiological arousal, a "fight or flight" reaction, anxiety, and stress. These negative effects are exacerbated the closer the distance and the more negative the encounter, and when



retreat or escape is not readily feasible.[9] In the case of anti-abortion protestors, empirical research documents that the stress from unwelcome encounters increases patients' post-surgical depression, but that a buffer of clinic escorts insulating patients from direct contact can moderate the distress. Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 J. Soc. & Clinical Psychol. 404 (1994) (studying patients at plaintiff Womenservices).

## III. Each of the Challenged Injunction Provisions Are Pinpointed to the Record, Burden Minimal Amounts of Protected Speech, and Are Essential to Protect Proven Threats to Significant Governmental Interests.

Based on the foregoing principles, this Court has frequently upheld some physical separation between protestors and their targets -- often with buffer zones greater than the modest 15 foot ones here -- in order to reduce the potentially intrusive or coercive effects of targeted demonstrations, and to protect privacy and autonomy of thought. *Madsen*, 114 S. Ct. at 2526-27 (ban on "sidewalk counseling" encounters and other demonstrating within 36 feet of clinic entrances necessary to protect physical and psychological well-being of those "captive to medical

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[9] *See, e.g.*, Marianne LaFrance & Clara Mayo, Moving Bodies: Nonverbal Communication in Social Relationships 68-69, 83-91, 108-11 (1978); Edward T. Hall, *The Effects of Personal Space and Territory on Human Communication, in* Nonverbal Communication in Human Interaction 114-31 (Mark L. Knapp, ed. 1978); Leslie A. Hayduk, *Personal Space: Where We Now Stand* 94 Psychol. Bull. 293 (1983); Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations*, 12 Population & Environ. 379 (1991) *See generally* Brief Amicus Curiae of American College of Obstetricians & Gynecologists, National Abortion Federation, and Planned Parenthood Fed. of America, Inc. in Support of Respondents.

circumstance"); *Burson v. Freeman*, 504 U.S. 191 (1992) (100 foot buffer zone around voting sites necessary to serve governmental interest in protecting citizens' freedom of choice in exercising franchise); *Cox v. Louisiana*, 379 U.S. 555 (1965) (demonstrations near courthouses can be curtailed because of appearance of coercive effect on judicial process);[10] *Boos v. Barry*, 485 U.S. 312 (1988) (upholding prohibition on three or more people congregating within 500 feet of foreign embassies because of risk of intrusion on and coercion of diplomats). The challenged injunction provisions here protect the same interests in the right to be let alone from coercive targeted encounters, and, as detailed below, "burden no more speech than necessary."

A. The Fixed 15 Foot Buffer Zones Around Driveways and Doorways. The district court found that this "clear zone" in ¶1(b) was necessary "to ensure that people and vehicles seeking access to the clinics will not be impeded, and will be able to determine readily where the entrances are located." 799 F. Supp. at 1434. Like the 36 foot buffer zone upheld in *Madsen*, it directly promotes the governmental interests in protecting unfettered ingress and egress, and guarding public safety and the free flow of traffic. 114 S. Ct. at 2527. It was added to the preliminary injunction because ingress and egress remained physically and visually obstructed despite the TRO's prohibition on blocking and impeding. Given the record of dangers caused by confused drivers trying to squeeze into narrow, obscured driveways, and of people

[10] *Cf.* 18 U.S.C. §1507, making it a crime punishable by up to one year's imprisonment to demonstrate near federal courthouses or places of business or residence of judges with intent to influence judges, witnesses, or court personnel. This statute leave little doubt that if Petitioners engaged in the conduct they targeted at clinics on the sidewalks or step of this Court, they would have been criminally prosecuted. *See also United States v. Grace*, 461 U.S. 171, 182 (1983) (impermissible for demonstrators to obstruct sidewalks or access to Supreme Court building and grounds).



unable to find the entrances or grabbed at, crowded, and intimidated by the demonstrators, the district court had no alternative other than to establish a clear zone.

The 15 foot zone is "pin-pointed" to its objective. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). It applies only to the places where people must traverse to gain access, *cf. Madsen*, 114 S. Ct. at 2528 (striking down buffer zone around side and back of building where people do not enter), and its distance, which is the length of an average car, is based on the safe turning radius and amount of visual space a driver needs while turning. (R. 13) It also reflects the amount of personal space people need to proceed in public without feeling stressed and intimidated. *See* pp.17-18, *supra*. Petitioners' contention that the fixed buffer zones are not sufficiently tailored because they are not site specific, (Pet. Br. 48) is meritless.[11] The length of a car and the necessary safe zone of public personal space do not vary from site to site, and the 15 foot buffer is easily applied at each facility.

The fixed 15 foot zone burdens a minimal amount of speech. Picketing that "obstructs or unreasonably interferes with ingress or egress" is not protected speech, *Cameron v. Johnson*, 390 U.S. 611, 617 (1968), and this record shows that by congregating in or near entrances defendants did unreasonably and intentionally impede and obstruct access. 799 F. Supp. at 1424. Outside the modest zone of 15 feet, Petitioners can continue to speak, pray, chant, leaflet, picket, and communicate with their targets. As the court below noted, the buffers do not hamper defendants' message, "only [their] intimidating method of demonstration." 67 F.3d at 389. Unlike the 36 foot buffer zone approved in *Madsen*, which pushed protestors across the street, the 15 foot buffer zone permits demonstrators to remain on the

[11] Petitioners have never previously objected to the lack of site specificity during the six years of this litigation. In fact, when *plaintiffs* sought some site specific modifications, (R. 454) defendants objected, arguing that it would be too confusing. (Hearing of 11/4/94)

adjacent sidewalks at all plaintiffs' facilities, *see* site plans lodged by Respondents with this Court, fully visible and audible to cars and pedestrians. Moreover, unlike the absolute, impermeable, buffer zone upheld in *Madsen*, this buffer permits two sidewalk counselors within its ambit.[12]

B. The 15 Foot Bubble Around Vehicles. Like the fixed zone around entrances, the 15 foot clear zone around vehicles is precisely tailored to the length and safe driving space for the average car. It is directly responsive to evidence that defendants swarmed around cars as they tried to proceed towards driveways, or played a "game" of "dare you to hit me" with drivers, or surrounded cars once they had parked, impeding the occupants' ability to get out. *See* pp. 8-9, *supra*. It, too, was added to the preliminary injunction when the evidence showed this conduct continuing unabated despite the TRO. Contrary to Petitioners' assertion, the fact that this bubble zone "floats" does not belie its narrow tailoring. Because cars move, the protective clear zone has to move with them.

The vehicle bubble protects governmental interests in public safety and traffic flow, and does no more than necessary to secure these interests. While the same objective could be accomplished by prohibiting congregating in the streets, the 15 foot bubble around cars is less restrictive because it leaves defendants free to stand in streets, which they occasionally do. The vehicle bubble also is necessitated by the governmental

[12] Petitioners' contention that the buffer zones are unconstitutionally "vague" due to use of the term "demonstrating" must be rejected. This term, which encompasses all of defendants' activities, is commonly used in injunctions regulating the manner of potentially disruptive and coercive protest. For example, the buffer zone provision upheld in *Madsen* used the term "demonstrating." 114 S. Ct. at 2522. This widely employed term is capable of being understood by people of ordinary intelligence, *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).



interest in medical safety. 67 F.3d at 389. Hostile strangers crowding up to a car, making the occupants feel trapped, is a particularly frightening, stress-inducing experience. (Tr. 355-56) The bubble also furthers the governmental interest in protecting the right to be let alone. When defendants congregate around a car, leaving it no clear space to proceed, the occupants are literally captive, and cannot escape without risking hitting their tormentors. (Tr. 519)

The protective bubble around cars burdens no more speech than the fixed buffer zones. "Sidewalk counselors" are able to approach to try to give literature to people in the cars, and the 15 foot distance leaves other protestors and their signs entirely visible and audible to drivers.

C. The 15-Foot Bubble Around Pedestrians. The evidence demonstrates that the 15 foot bubble around pedestrians is essential to maintain a safe zone of personal space around those people who must enter the clinics on foot, rather than in cars.[13] While trying to proceed on foot through the crowds, without the protective shell of a vehicle, patients are at their most vulnerable. Testimony showed that defendants grabbed at people, elbowed and shoved them, thrust literature on their bodies, impeded their progress down sidewalks or through parking lots, and yelled in their face. Moreover, even though defense witnesses acknowledged that a close encounter with more than two strangers would be very intimidating, as many as four or five demonstrators often encircled patients, brushing and bumping against them. *See* p. 12, *supra*.

[13] In *Madsen*, where the evidence was that all patients arrived by car, there apparently was no need for a bubble around pedestrians. The 36 foot absolute buffer zone, which kept all demonstrators, even "sidewalk counselors," across the street from the vehicle entrance points, was sufficient to protect the governmental interests. Here, in contrast, where the fixed buffer zone does not push demonstrators across the street, and where patients often arrive on foot, only a modest bubble around pedestrians fully secures the interests at stake.

While the First Amendment requires metaphoric "breathing space" for the exercise of expressive rights, *Boos v. Barry*, 485 U.S. at 322, it also surely allows literal breathing space for medically vulnerable individuals and health care providers targeted by demonstrators proven to act in a loud, intimidating, invasive fashion.

This protective zone's distance is pinpointed to the medical expert testimony that 15 feet is the amount of personal space necessary in this health care context to reduce psychological stress, privacy invasion, and the concomitant medical risks. Indeed, based on the testimony, the district judge would have been warranted in ordering a larger zone, as Dr. Hoagland testified that a large number of demonstrators 25 feet away from a medical patient could augment stress when, as here, they are perceived as loud and hostile. (Tr. 748-51) *Cf. Galella*, 487 F.2d 986 (paparazzo photographer required to stay 25 feet away from Jackie Onassis and her children).

The 15 foot bubble around pedestrians is of utmost importance for the governmental interest in medical safety and privacy. As the court below noted, patients entering and leaving the clinics before and after surgery are in a medically vulnerable state, and need to be protected from running a gauntlet of intimidating and stress-inducing demonstrators. 67 F.3d at 389-90. This Court emphasized in *Madsen* that picketing targeted at patients "threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S.Ct. at 2526. The district court here found that defendants intentionally target for harassment "young women who are already undergoing the stressful situation of terminating an unwanted pregnancy." 799 F. Supp. at 1428. Thus, the bubble around people, which serves to alleviate stress and the invasive effects of defendants' cameras, is necessary to protect the governmental interest in ensuring that targeted protests do not become instruments of duress and coercion. *Frisby*, 487 U.S. at 486-87.

The pedestrian bubble also promotes public safety and



unfettered ingress and egress. When pedestrians are surrounded, intimidated, or impeded in their ability to walk down the sidewalk, they do not have unobstructed access. If a court can establish clear zones around the points of entry, *Madsen*, 114 S.Ct. at 2526-28, then surely a court can also provide limited protection for people to proceed towards those entryways, when they are most vulnerably exposed. For example, if a governmental official or judge were giving a speech that was threatened with disruption by protestors, just as law enforcement could prevent people from coming too close to the assembly hall entrance, they could also cordon off a clear zone around the targeted dignitary, both to ensure access and to protect the judge's safety and mental tranquility. It would be foolish and dangerous to hold that all the law can do in this instance, or in the context of patients trying to obtain medical care, is keep the entranceways clear, but not maintain safe space around the trapped target of the protest.

Like the other clear zones, the pedestrian bubble burdens no more speech than necessary to preserve a safe, stress-reducing zone of personal space. By regulating only defendants' physical proximity to a vulnerable group of patients it preserves the right to approach for "sidewalk counseling" and allows defendants to engage in a complete range of expressive activities from only 15 feet away, leaving them completely audible and visible to their targets. Petitioners' contention, Pet. Br. 48-49, that the bubble silences their speech on the sidewalk is plainly wrong. So long as they do not invade the 15 foot bubble, there is nothing they cannot do or say on the adjacent sidewalks, except make excessive noise and impede. And, like the bubble around moving cars, the pedestrian bubble must "float" along with moving people to ensure unmolested access to hospitals and clinics. There is no evidence that the "floating" nature of the bubble has ever been used to push defendants off the sidewalk; defendants' targets are far too desperate to get where they are going without interference to try to chase defendants away. Contrary to Petitioners' contention, Pet. Br. 49, the only "bulldozing" here has been by defendants, who

have rolled over the rights of others.[14]

D. The Requirement that "Sidewalk Counselors" Cease and Desist and Back Off 15 Feet from Unwilling Targets.

Petitioners' principal objection to the requirement in ¶1(c) that they stop face-to-face "counseling" of those who have rejected it and back away 15 feet is the misplaced contention that it is indistinguishable from the "no approach" provision struck down in *Madsen*. The "cease and desist" or "right to walk away" clause rests on a significant distinction. While *Madsen's* "no approach" requirement prohibited all uninvited approaches, ¶1(c) of the present injunction specifically *permits all uninvited approaches*. As the court below explained, the demonstrators "may approach without being invited and need not retreat unless expressly rejected by a counselee, and then only to a distance of 15 feet." 67 F.3d at 390-91. Thus, the "cease and desist" clause is much more narrowly pinpointed to the objective of protecting the right to be let alone. Whereas the "no approach" provision made it more difficult for demonstrators to reach prospective listeners, the present injunction protects only *unwilling* listeners from forced proximity to the unwanted messenger and from being stalked at very close range. Those who are willing to engage with the demonstrators have the unfettered right to do so.

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[14] Petitioners also object that they do not know the extent of the floating zone. The district court has already clarified that all the injunction's provisions apply at the clinics themselves. (JA 29) Thus, as Petitioners acknowledged below, the district court's clarification confines the injunction to the immediate sites of the clinics while people are in the act of trying to get in or out. (Panel oral argument) Respondents would have no objection to more precise geographical boundaries -- *e.g.* to the public transit stop one block away from Womenservices, or to the end of a particular block. Indeed, Respondents asked the district court for such site specific modifications at the new location of Womenservices. The district court, which is familiar with the sites and the record, is the proper forum to make such modifications.



When Petitioners argue that targets have no right to "disinvite" them, Pet. Br. 36, or to "veto" them by saying no and trying to walk away, Pet. Br. 38, they are again insisting that they can force themselves on unwilling listeners, get in people's face and stay there. There is, of course, no such right under the First Amendment. *See* Part II, supra. In denying that people have the right to be left alone, Petitioners invoke the First Amendment in vain. They would turn it into a license to trample on others' autonomy and intimidate those who disagree with them. Petitioners also turn upside down the notion of an "audience veto," which applies when some audience members try to disrupt a speaker so that others who want to hear cannot do so. Here, in contrast, each targeted person makes up her own mind whether to listen or to walk away. Her "veto" neither inhibits other listeners nor "vetoes" the speakers' right to address willing recipients any more than does walking out on a speech, or saying "no thanks" to a handbiller. Indeed, a target's refusal does not even shield her from the message, because the rebuffed "counselor" can continue saying anything he wants from 15 feet away.

In light of the evidence that "sidewalk counselors" routinely refuse to respect people's wishes to be left alone, the "cease and desist" provision is essential to secure the governmental interest in protecting the privacy and personal space of unwilling listeners. It also ensures safe conditions for medical care, as highlighted in testimony about how the unwanted encounters made patients so distraught they faced increased risks from surgery. The "cease and desist" clause also advances the governmental interest in public safety, because persistence by unwanted "sidewalk counselors" often leads to aggressive physical encounters -- "counselors" grabbing, shoving, elbowing, tripping, and knocking down people, and punches thrown by people angry that the "counselors" won't leave them alone. *See* pp. 13-14, *supra*. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) ("face-to-face words likely to cause a breach of the peace" are "fighting words" unprotected by First Amendment).

Faced with the aggressive refusal of "counselors" to leave people alone, the district court concluded that the "cease and desist" provision is necessary to protect vulnerable patients from becoming unwilling "captives":

> The evidence ... clearly shows that, even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message. It is obvious, therefore, that women ... cannot, as a practical matter, escape defendants' message. Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid receiving defendants' message. The only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion. Thus, women entering plaintiffs' clinics are a "captive audience" for defendants' message and the "cease and desist" provision of the injunction is warranted.

799 F. Supp. at 1436.

Although they do not challenge these factual findings, Petitioners nonetheless dispute that the "captive audience" principle can apply on a public sidewalk. It is, they contend, limited to the home. Pet. Br. 41-44. Their argument is flawed for two reasons. First, as the district court found, it is Petitioners' own "aggressive conduct" that makes the principle applicable here. Secondly, this Court has never limited the doctrine to the home, as *Madsen* itself demonstrates in noting that the patients were "held 'captive' by medical circumstance." 114 S. Ct. at 2526. *See, FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978) (family in car); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (public transit commuters); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (people *on streets* or at home bombarded by sound trucks)



(emphasis added).

In balancing the speaker's right to communicate against the listener's right to be let alone, this Court has applied the captive audience doctrine when: 1) a strong privacy interest is implicated, *see, e.g., Frisby*, 487 U.S. at 484 (residential privacy); and 2) the target cannot practically avoid unwanted communication, *see, e.g., Lehman*, 418 U.S. at 307 (Douglas, J., concurring); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (doctrine applies when "degree of captivity makes it impractical for the unwilling auditor to avoid exposure"); and 3) less intrusive alternatives for communication are afforded the speaker, *see e.g., Frisby*, 487 U.S. at 483; *Pacifica* 438 U.S. at 750.

These reasons obtain here. First, women seeking access to hospitals and clinics are exercising their constitutionally protected right to abortion. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As a constitutional right, the medical privacy interest here is even stronger than the residential privacy interest recognized in *Frisby*. *Accord Madsen*, 114 S. Ct. at 2526; *see also, Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) ("The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."). Moreover, defendants' targeted harassment of vulnerable medical patients invades these "substantial privacy interests in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971).

Second, as the district court found, women seeking access to hospitals and clinics have no practical means of avoiding unwanted communication. The usual remedies -- avert one's eyes, or walk away -- are nullified by defendants' conduct. When yelling "sidewalk counselors" walk alongside their targets, they are literally like the blaring soundtrucks in *Kovacs*. Indeed, here it is much more difficult to escape the verbal and physical harassment than it was for the bus commuters in *Lehman*, who could simply turn away by reading a book or looking out the window, or the father in *Pacifica*, who could turn off the radio.

Finally, the "cease and desist" provision is couched in the narrowest terms to achieve the governmental objective, and burdens little, if any protected speech. It places no restriction on "sidewalk counselors" until a target refuses them, and then it merely requires the "counselor" to respect the requisite zone of personal space by backing away 15 feet so that the targets are no longer "captive" and free to continue to their destination. Contrary to Petitioners' contention, "sidewalk counselors" are not muzzled; once 15 feet away, the counselor "may continue advocating his or her beliefs to the woman who has refused them ... [and] remains free, as well, of course, to approach anyone else to attempt to 'counsel' them or to hand out leaflets to passersby." 67 F.3d at 391.[15] All that is proscribed is the conduct of following people closely down the sidewalk, crowding and impeding them, yelling at and badgering them -- conduct independently proscribable as assault, harassment, disorderly conduct, or intentional infliction of emotional distress. *Cf.* New York Penal Law § 240.25 (Consol. Supp. 1996), and § 240.26 (1984); *Galella v. Onassis*; *Brennan*; *Van Duyn; Calvert*; *Flamm*; all cited *supra* pp. 34-35.

Petitioners' final challenge to the "cease and desist" clause -- its purported vagueness -- must also be rejected. While Petitioners contend that they do not know what is encompassed by someone "verbally or non-verbally indicating they do not want to be counseled," this provision is capable of being understood by the person of average intelligence. Several common phrases and gestures in this culture, understood by everyone, mean "leave me alone," "no," or "go away." Moreover, the district court clarified that this provision requires clear and convincing

[15] Petitioners conceded at the *in banc* oral argument that this is the proper reading of the "cease and desist" clause. Oral Arg. Tr. 42-3.



evidence[16] that the targets "manifested their desire to be left alone in such a way that [the sidewalk counselor] could have reasonably been expected to understand and comply with that desire." (JA 97)

## IV. Petitioners' Challenge to the Injunction Based on Subsequent Events, While Not Properly Presented, Shows that Certiorari Was Improvidently Granted.

Petitioners contend that in July 1993, when the district court dismissed the 42 U.S.C. § 1985(3) claim with leave to amend,[17] Respondents were left without a cause of action supporting injunctive relief, Pet. Br. 31-33, even though the district court also based injunctive relief on some of the remaining state law claims. This argument essentially seeks review of the district court's decision not to vacate the preliminary injunction. 828 F. Supp. 1018 (W.D.N.Y. 1993). In unanimously affirming this decision, the initial Second Circuit panel noted that Petitioners never raised this challenge below. 67 F.2d at 367-68. Petitioners neither sought *in banc* review of this decision, nor raised this issue in their petition for a writ of certiorari. Thus, whether the federal and state causes of action now in the case assert sufficient legal "interests" to warrant injunctive relief is not properly before this Court. As this Court held in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993), refusing to vacate a similar injunction, the district court is the proper initial forum for determining what state or federal law bases may exist to support

[16] Since *International Union, United Mineworkers of America v. Bagwell*, 114 S. Ct. 2552 (1994), contempt proceedings in this case have been criminal; thus, proof beyond a reasonable doubt is now required.

[17] Respondents subsequently filed an amended complaint and reasserted a § 1985(3) claim based on both the "hindrance" and "deprivation" clauses of that statute. (R.471) The district court has not yet ruled on motions pertaining to this amended complaint. (R. 476, 478)

injunctive relief after dismissal of the 42 U.S.C. § 1985(3) claim. Should this Court conclude that the legal claims supporting injunctive relief require reexamination in light of post-1992 legal developments, rather than ruling on an improperly preserved question, the proper course is to dismiss the writ of certiorari as improvidently granted. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1994); *Springfield v. Kibbe*, 480 U.S. 257 (1987).

Although Petitioners have not properly preserved their challenge to the 1993 district court decision, their invocation of one of the many events subsequent to the February 1992 preliminary injunction demonstrates that the order has become legally and factually stale in the intervening four and a half years.

Shortly after the issuance of the preliminary injunction, defendants resumed the blockade tactic with a resounding flourish. During the so-called "Spring of Life" Operation Rescue campaign against Buffalo clinics in April and May of 1992, hundreds of demonstrators took part in mass blockades at plaintiffs' health care facilities. These blockades often erupted into physically violent altercations, R. 171, 176, and hundreds of demonstrators, including many of the named defendants, were arrested. *See* Brief Amicus Curiae of Feminist Majority Foundation. The repeated violations of the preliminary injunction during this siege resulted in criminal contempt charges against six individual Operation Rescue leaders, *In re Slovenec*, 799 F. Supp. 1441 (W.D.N.Y. 1992), who subsequently pled guilty. In the summer of 1993, defendants again staged a series of blockades, including using children to lie or sit in driveways. R. 373-76. Additional criminal convictions resulted. *United States v. Walker*, 94-Cr-32S (W.D.N.Y. 1995). The district court noted the "Spring of Life" blockades and the subsequent criminal contempt proceedings when it refused to vacate the preliminary injunction. 828 F.Supp. at 1029. Yet another series of criminal contempt convictions resulted from additional violations in 1994, including several incidents of obstructing driveway entrances and screaming right in the face of



patients who asked to be left alone. *United States v. Boldt & Walker*, 95-Cr-17E (W.D.N.Y. 1995).

In addition to the increased blockading and harassment, the controversy now encompasses new locations. Three plaintiffs relocated, resulting in a motion by plaintiffs to modify the injunction in light of how the defendants' activities affected the new physical locales. R 454. Defendants insisted that any modifications should await resolution of all appeals. Two additional providers intervened as plaintiffs when they were threatened with disruptions, R. 166, 398, and new defendants have been joined. R 423, 434.

These subsequent events demonstrate that no matter what this Court were to say about the now outmoded four and one half year old preliminary injunction, which unfortunately has been woefully insufficient to preserve law and order, the district court will no doubt have to fashion a new injunction with a more adequate buffer zone. Even Petitioners and the dissenters below concede that blockades in defiance of a prior injunction warrant absolute "across-the-street" buffer zones like that upheld in *Madsen*. Pet. Br. 29-30; 67 F.3d at 400-01.

Based on these changed circumstances, this Court should dismiss the writ of certiorari as improvidently granted to allow the district court to craft an updated injunction responsive to the new factual and legal developments. *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970) (dismissing writ granted to review five year old injunction against picketing because of changed circumstances). Unlike *Taggart*, where the activities giving rise to the injunction had subsided, here they have significantly escalated, making the need for the district court to evaluate relief in light of the full, non-stale record even more compelling. For this Court to act now, in the face of such exacerbated subsequent circumstances, would be an inefficient use of judicial resources; subsequent appellate review after the district court has had the opportunity to update the injunction would be much more informed to the actual nature of the present controversy.

Because the case constitutional question here demands a fact-intensive analysis, it is especially important to base review of injunctive relief on complete and up-to-date facts. This Court would be well within its discretion to dismiss the writ in light of the stale and incomplete factual record now presented. *See, e.g., Estes v. Metropolitan Branches of Dallas NAACP*, 444 U.S. 437 (1980) (dismissing writ because of insufficient record in case involving complex, precisely tailored desegregation injunction); *Johnson v. Massachusetts*, 390 U.S. 511 (1968); *Smith v. Mississippi*, 373 U.S. 238 (1963) (dismissing writ because factual record relevant to constitutional claims insufficient).

## CONCLUSION

For the foregoing reasons, the decision of the *in banc* U.S. Court of Appeals should be affirmed, or in the alternative the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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FILED
AUG 1 1996
CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

REVEREND PAUL SCHENCK AND
DWIGHT SAUNDERS,

*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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The injunctive restrictions at issue directly restrict speech in traditional public fora. The "fixed buffer zones" prohibit all "demonstrating" within fifteen feet of the entrances and driveways of abortion facilities. Pet. App. A-183. The "floating bubble zones" prohibit all "demonstrating" within fifteen feet of any person or vehicle coming to or going from abortion facilities. *Id.* The "cease and desist" provision enables "anyone or any group of persons" to veto speech in a public forum by "verbally or nonverbally" indicating a desire not to be counseled. Pet. App. A-29, A-184.

Respondents and their amici downplay the extreme nature of the speech-restrictive injunctive provisions at issue. Resp. Br. at 30; Brief of United States at 26 n.15; Brief of American Civil Liberties Union *et al.* (ACLU Br.). Yet the challenged provisions represent some of the most outrageous restraints on free speech ever to come before this Court.

## FLOATING BUBBLE ZONES AND FIXED BUFFER ZONES

The "floating bubble zones" prohibit "demonstrating" within 15 feet of anyone coming to or going from any abortion facility. Petitioners and other defendants dare not "demonstrate" on any sidewalk less than 15 feet wide because passing pedestrian traffic will put "demonstrators" in contempt of court. Indeed, petitioners cannot "demonstrate" on *any* sidewalk, no matter how wide, because there is no reason to believe abortion staff, patients, and escorts will voluntarily leave a 15-foot berth when walking by. In effect, these invisible, floating, anti-speech zones flatly ban praying, preaching, singing hymns, picketing, leafletting, and anything else deemed to be "demonstrating." Even the district court that created these zones considered the concept of floating bubble zones unworkable and unfair. Dkt. 13, p. 36 (Tr. of 9/27/90) (App. A to this reply brief). Said the court:

> my gosh, you would never be able to ever realistically know how to deal with that, if it was a moving length . . . . I think you have to apply common sense to this too, and that would

not in any way at all be a fair interpretation [of the TRO].

*Id.*[1] Unfortunately, the district court's preliminary injunction imposed precisely this unrealistic and unfair restriction.

There is also no geographic limit to these floating bubbles. Respondents in effect concede the need for such limits. Resp. Br. at 42. The ACLU concedes that the absence of geographical boundaries renders the floating zones unconstitutionally vague. ACLU Br. at 23 n.20.

Both the fixed buffer zones and the floating bubble zones prohibit "demonstration," and only "demonstration," within the zones. Hence, these injunctive restrictions directly target *expression*, not conduct. Other provisions of the injunction already forbid trespassing, blocking, obstructing, physically abusing, grabbing, touching, pushing, shoving, and crowding. Pet. App. A-183 to A-184. These zones therefore ban only peaceful speech, indeed "the entire universe of expressive activity," Pet. App. at A-52 (Meskill, J., dissenting), including "such sacrosanct First Amendment conduct as holding a placard containing an antiabortion message, passive leafletting or handbilling, silent picketing and even the mere voicing of protest," *id.* at A-54. Furthermore, the 15-foot speech-free zones reflect no site-based tailoring, but instead impose a one-size-fits-all restriction on "demonstration". The validation of this injunction would be the universal validation of 15-foot zones.

The fixed buffer zone is unconstitutionally vague as applied to abortion facilities in multi-tenant buildings or with shared doorways, driveways, and parking lots, where it is unclear what the "doorway entrance" or driveway of the abortion facility is.

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1. It appears that the district court was badly confused about the terms of its own TRO. *Compare id. with* JA 23, ¶ 1(a).



*E.g.*, Tr.[2] 207, 210 (unclear whether "entrance" applies to abortion facility on fifth floor or front door of office tower); Tr. 419-20 (escorts themselves do not know where buffer zone applies).

CEASE AND DESIST PROVISION

The cease and desist provision suffers from a fundamental flaw: it subjects peaceful speech in a public forum to a consent requirement. Pet. Br. § V(B), (C). This Court struck down an indistinguishable provision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Pet. Br. § V(A).

Respondents claim that this provision "protects only *unwilling* listeners from forced proximity to the unwanted messenger and from being stalked at very close range." Resp. Br. at 42 (emphasis in original). This argument founders, as a matter of *law*, on *Madsen*, 114 S. Ct. at 2529. Respondents are also wrong, as a matter of *fact*, in at least two obvious respects. For one thing, this provision permits the pregnant woman's companion[3] (who may be pressuring her to abort[4]) to veto the sidewalk counseling and thus cut off communication with a

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2. "Tr." refers to the consecutively paginated transcripts of the preliminary injunction hearings held from March 6, 1991 through April 1, 1991.

3. The injunction empowers "anyone *or any group of persons*" to invoke the "cease and desist" requirement. Both respondents' counsel, dkt. 65, p. 1322 (Tr. of 2/14/91) ("a companion saying no" suffices) and the district court, JA 133 (relying in part on male companion's verbal objection to counseling) interpret this provision to allow the pregnant woman's companion to veto efforts to reach her. The Second Circuit evaded the question. Pet. App. at A-30 n.5. Respondents' partial concession at oral argument in the Second Circuit, cited by that court, *id.*, did not specifically address the situation of a companion cutting off sidewalk counseling to a woman.

4. Many patients (one witness estimated ten percent) are pressured to abort, against their will, by parents, boyfriends, and so forth. Tr. 630-31, 697.

possibly willing recipient.[5] *See also* Tr. 1284-86 (App. B to this reply brief). For another, the cease and desist provision does not prohibit proximity or stalking; it only prohibits *communication* within a certain distance. Thus, a person who does not "demonstrate" or sidewalk counsel could "stalk" as closely as he wished without running afoul of the "cease and desist" provision or, for that matter, the bubble and buffer zones.

This provision also suffers from gross vagueness. A verbal or nonverbal "indication" of a desire not to be counseled triggers the cease and desist requirements. Pet. App. at A-29 (as modified by Second Circuit). The ACLU concedes that the "nonverbal indication" language is unconstitutionally vague. ACLU Br. at 25 n.21. Respondents claim that there are commonly understood ways of verbally indicating a desire not to be counseled. Resp. Br. at 46. This is true but irrelevant. For every clear verbal statement, there are countless ambiguous utterances and vague nonverbal signs.[6] Respondents' invocation of a "reasonableness" test and a heightened standard of proof, *id.* at 47, merely transfers the second-guessing to a finder of fact in the subsequent contempt trial of the hapless sidewalk counselor.

## BUFFERS AND BUBBLES FOR VEHICLES

Respondents defend the 15-foot zones as applied to cars by urging that 15 feet is the length of the average car and therefore corresponds to "a safe turning radius and amount of visual space a driver needs while turning." Resp. Br. at 37. This argument offers no more than a colorable basis for an apparently arbitrary

5. The reverse can also occur: the woman says no, but the companion is willing to hear out the sidewalk counselor. *E.g.*, Tr. 1588-89.

6. It can also be unclear whether a woman "indicating" a desire to be left alone is addressing the sidewalk counselors or the pro-abortion escorts. *E.g.*, Tr. 1547-48.



distance. More than that is necessary to justify abridgement of free speech in public fora. The "turning radius" argument, for example, makes no sense as applied to portions of the sidewalk which are adjacent to, but do not cross, the driveway – cars do not drive or turn there. The "visual space" argument does not apply to pedestrians who neither stand in the path of a car nor block the side view of a car pulling *onto* a street.

In the past, drivers have willingly stopped, and they and their passengers have received the communications of sidewalk counselors. Tr. 146, 225-26, 354-55. Such peaceful exchanges impede neither the turning nor the vision of the driver. Respondents' proposed justifications simply do not fit the ban in question.

## REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents expend twenty pages on their statement of the case. It is mathematically impossible, in the twenty pages allowed for this reply brief, to point out all of the inaccuracies, exaggerations, half-truths, and distortions contained in respondents' lengthy recitation. Petitioners wish, however, to make certain observations regarding the facts in this case.

1. Respondents have seriously failed in their obligation to present the record accurately.[7] In a First Amendment case, this Court has an independent obligation to review the entire record. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2344 (1995). This duty applies with full force here. Petitioners cannot emphasize enough that

7. Respondents accuse petitioners of being "utterly disingenuous," Resp. Br. at 7, because petitioners supposedly denied that there were any blockades at abortion facilities. But the documents respondents cite – Pet. at 5; Pet. Br. at 14, 30 – refer to the absence of any blockades *after the TRO* (and prior to the preliminary injunction). *See* Pet. at 5-6 (quoting district court's finding of this very fact).

respondents' factual representations simply are *not* reliable. Each assertion of respondents must be compared against the record.

a. Respondents assert that the record here is "evocative" of the record in *Madsen*. Resp. Br. at 23. But the district court found that, after issuance of the TRO, *no defendants physically blocked patient access.* Pet. App. A-146 & n.5. The district court also found that defendants' "demonstrations are usually peaceful in nature," Pet. App. A-144. Twelve of the fifteen judges sitting *in banc* in the Second Circuit explicitly recognized that "the record in *Madsen* revealed a considerably greater history of disruption than does the record in the instant matter." Pet. App. A-144 (Winter, J., concurring, writing for ten judges). *Accord* Pet. App. A-50 to A-51 (Meskill, J., dissenting, writing for two judges). *See also* Pet. App. A-8 (lead opinion of Oakes, J.) (reciting district court finding that the "demonstrations are mostly peaceful in nature").

b. Respondents distort the record of supposed misconduct by picketers. Some of the most blatant examples follow.

Respondents state that Susan Ward, an employee of respondent Buffalo GYN Womenservices, "testified that even after the TRO, she was blocked every day when she came to work." Resp. Br. at 9 (citing Tr. 620-21). What Ms. Ward actually said was that "on Wednesdays and Fridays" she was delayed "[m]omentarily" while waiting for people carrying signs on the sidewalk which crosses the driveway to move out of the way. Tr. 620-21. Respondents quote Ms. Ward as recounting an incident when she "could not get into the driveway at all," Resp. Br. at 9 (quoting Tr. 621), representing that this occurred "despite the TRO's prohibition on blocking," Resp. Br. at 9. But in fact Ms. Ward testified that this incident occurred "when they [i.e., the picketers] were allowed to do more of the blockading," Tr. 621, which clearly refers to the time *prior* to the TRO, and



therefore cannot be "despite the TRO."

Particularly egregious is respondents' description of the activity for which defendants Bonnie Behn and Carla Rainero were held in civil contempt. Respondents characterize the incident as Behn and Rainero "harassing and stalking a patient the length of a city block and terrorizing her with a videocamera," Resp. Br. at 5 (citing JA 102-20). In fact, as the district court found, Behn and Rainero simply walked along with the woman, verbally counseled her, and offered her literature. JA 106-09. The undisputed evidence showed that neither Behn nor Rainero shouted, assaulted, grabbed, touched, blocked, or did anything other than communicate peacefully. The court did not even find that Behn or Rainero approached too close to the woman. Rather, the district court held Behn and Rainero in contempt because the court found that they "ignored the young woman's manifested desire to be left alone and continued to counsel her," in violation of the "cease and desist" provision. JA 117. For this, Behn and Rainero were fined $10,000 each, JA 119, and held jointly liable for $25,260.16 in attorney fees, dkt. 427 (Order of 3/15/94).

Respondents assert that a "demonstrator" caused a pro-abortion escort to "fall under a car," Resp. Br. at 9 (citing Tr. 343-44), and that "some of the [picketers'] helpless babies were nearly run over" by cars, Resp. Br. at 10 (citing Tr. 344-45). The cited portions of the record simply do not substantiate these inflammatory allegations.

Respondents accuse defendants of "trespassing" into the building housing the respondent Erie Medical Center, Resp. Br. at 10, but the first floor lobby where this supposed "trespassing" took place contains a restaurant and a drugstore and is open to the public, Tr. 237-38.

Respondents assert that defendants, "despite the TRO, invaded the clinic's waiting room on the fifth floor." Resp. Br. at 10. The actual testimony was that on one occasion an unidentified young man was "wandering around the waiting room, with no apparent reason," Tr. 352. His only alleged connection to the defendants was that, after he left the building, he "was seen speaking to the anti-abortion people outside," *id.*

Respondents describe incidents of vandalism. Resp. Br. at 10. But these involved either pre-TRO blockades or the acts of unknown perpetrators.

Respondents quote testimony about people allegedly lying or kneeling in the driveway to block cars, asserting that this testimony applied to post-TRO activities. Resp. Br. at 11. But the transcript in question shows that the witness was testifying about pre-TRO activities in 1989. Tr. 185-86. (The TRO issued in September, 1990.)

Respondents claim that petitioner Rev. Paul Schenck "pinned patient escort Warnes up against the door." Resp. Br. at 12. Respondents' *counsel* tried to characterize the situation this way, but this was not what witness Warnes said, Tr. 183-85.

Respondents accuse sidewalk counselors of "shouting directly into patients' faces." Resp. Br. at 12. In fact, the testimony shows that when picketers or sidewalk counselors shouted, it was because their audience was some 30 feet or more away down a driveway, Tr. 65-66, 124, 127-28, or on the other side of a glass barrier, *e.g.*, Tr. 175-76, 248-49 (lobby doors at Womenservices). Respondents assert that "[w]itnesses also described . . . actual . . . fist-fights," Resp. Br. at 14 (citing Tr. 180), but the cited testimony mentions no such incidents.

Respondents claim that "the invasive behavior of the anti-abortion protestors [sic] . . . sends some asthmatic patients into respiratory arrest." Resp. Br. at 15. The actual testimony was that one patient with asthma was "upset" and "was not able to



breathe normally," Tr. 508.

c. Respondents completely ignore the role of the pro-abortion "escorts" of the respondent Pro-Choice Network of Western New York. The *raison d'etre* of these escorts is to counter pro-life sidewalk counseling. Tr. 99, 217-18, 380. Escorts immediately approach anyone whom pro-life individuals try to counsel. Tr. 128. The escorts try to get closer to that person than the sidewalk counselors, surround that person, and talk continuously about anything and everything in order to nullify the counselors' efforts to communicate. Tr. 130-31, 174, 215-16, 271, 291, 395-96. Escorts urge people not to listen to pro-life counselors and tell vehicles to move on past the counselors, even when the occupants have willingly stopped and are listening to sidewalk counselors. Tr. 226. *See, e.g.*, Tr. 1289-90 (App. B to this reply brief). Escorts have used whistles, kazoos, chanting, shouting, singing, and loud music to drown out pro-life speech. Tr. 117-18, 127, 226-27, 385-86, 1644-46. Escorts have physically blocked pro-lifers with their bodies or with signs or building materials in an effort to disrupt their counseling. Tr. 126, 387-89, 1646-47. At least one escort used a squirt gun against pro-life counselors. Tr. 141, 1649. Others have tried physically "to take the driveway" away from pro-life pedestrians, Tr. 143, and have linked arms in a human blockade of their own, Tr. 192-93. One of respondents' attorneys blocked and battered a sidewalk counselor. Dkt. 139, pp. 1490-92 (Tr. of 10/30/91).

It is precisely the escorts' physical interference and disruptive noise-making which make the communication of the sidewalk counselors' message an arduous task. *See also* Pet. App. A-148 n.6; Tr. 1287-90 (App. B to this reply brief).

2. Respondents portray the defendants as insufferable pests. Presumably their hope is to induce this Court to abrogate petitioners' free speech rights out of sheer irritation. This effort

is misguided.

First, the bulk of the evidence respondents marshal in order to disparage the defendants is irrelevant to this appeal. Petitioners do not contest the constitutionality of bans on "physically abusing, grabbing, touching, pushing, shoving, or crowding persons" or on "trespassing on, sitting in, blocking, impeding, or obstructing access." Pet. App. A-183 to A-184. While petitioners deny that respondents' allegations of such conduct are accurate, petitioners do not claim a *right* to engage in such behavior.

Second, even after twenty pages of effort, respondents still have not mustered a showing of "pervasive violence" that could justify the extraordinary restrictions at issue.[8] In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court held that even incidents of gunshots, slashed tires, beatings, and vandalism failed to justify restraints on expressive activity. *Id.* at 904-06, 916-17, 924 & n.67. In the case at bar, there were not even any sit-ins after the TRO issued.[9]

RESPONDENTS' MISCITATIONS

Respondents and their amici blatantly miscite a series of important decisions of this Court:

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8. Certain amici point to supposedly nationwide "violence" against abortion facilities. Brief of Feminist Majority Foundation *et al.* § IV. This self-serving hearsay goes far outside the record. Furthermore, FMF's outlandish definition of "violence" includes peaceful sit-ins, *id.* at 2a, constitutionally protected activity such as residential picketing, *id.*, and acts as trivial as litter, *id.* at 7a ("disposal of trash on clinic property" equated with "vandalism," which is deemed "the most highly reported type of violence").

9. Respondents refer to events occurring after the appeal from the preliminary injunction. *E.g.*, Resp. Br. at 48-49. This is improper. *See* Pet. App. A-17 n.3.



Respondents cite *Boos v. Barry*, 485 U.S. 312 (1988), as "upholding prohibition on three or more people congregating within 500 feet of foreign embassies," Resp. Br. at 36. *See also* Brief of American Medical Women's Ass'n, *et al.* ("AMWA Br.") at 20. In fact, *Boos* construed the ban in question only to apply to congregations which threaten the peace or security of an embassy, 485 U.S. at 330-31; "[t]herefore, peaceful congregations . . . are not prohibited," *id.* at 333.

Respondents cite *United States v. Grace*, 461 U.S. 171 (1983), as sustaining a ban on obstruction on sidewalks. Resp. Br. at 36 n.10. This is ludicrous. *Grace* struck down a ban on leafletting or the display of signs on the sidewalk surrounding the Supreme Court Building.

Respondents cite *Cox v. Louisiana*, 379 U.S. 559 (1965), as permitting "demonstrations near courthouse [to] be curtailed," Resp. Br. at 36. *See also* AMWA Br. at 20-21. But in light of *Grace*, *Cox* cannot stand for that proposition. In fact, *Cox* upheld only restrictions on picketing intended to interfere with the administration of justice or improperly influence judges, jurors, witnesses, or court officers, 379 U.S. at 560 – i.e., certain "illegal purpose" picketing.

Respondents cite *Beth Israel Hospital v. NRLB*, 437 U.S. 483 (1978), as "upholding . . . complete bans on union leafletting in areas where patients gather." Resp. Br. at 29. In fact *Beth Israel*, which was not even a First Amendment case, *overturned* a prohibition on leafletting and solicitation in the cafeteria and coffee shop of a private hospital.

Respondents cite *Rowan v. United States Post Office*, 397 U.S. 728 (1970), for the unqualified proposition that there is no right to press even a good idea on an unwilling recipient. Resp. Br. at 31. Respondents' amici go further, citing *Rowan* for the proposition that "it is constitutional to restrict speech based on notice communicated by a listener that further communication

is unwanted." AMWA Br. at 3. These descriptions overlook the obvious: *Rowan* upheld a statutory right of a *resident* to refuse unwanted mail. This Court explicitly distinguished the home from other settings. 397 U.S. at 738. *Rowan* does *not* support the constitutionality of restrictions on the countless messages pressed repeatedly – by everything from billboards to hawkers to picketers – upon those using public fora.

## INAPPLICABILITY OF "RIGHT TO BE LET ALONE"

Respondents contend that, from their perspective, "the right to be let alone is central to this case." Resp. Br. at 22. Whereas the restrictions at issue apply to classic free speech activities, in the traditional public fora of streets and sidewalks, respondents' "right to be let alone" translates into a supposed "First Amendment right to reject unwanted speakers," Resp. Br. at 31, or as respondents' amici characterize it, "the ability to choose for ourselves what ideas and thoughts we want to be exposed to." AMWA Br. at 9 (quoting law review article). Of course petitioners, as private individuals, cannot violate rights applicable only against state action. Here, no government agency has posted sidewalk counselors or forced anyone to listen to them. In any event, recognition of a right "to choose what ideas and thoughts we want to be exposed to" is completely incompatible with a speakers' right "to choose the content of his own message," *Hurley*, 115 S. Ct. at 2347. While the auditor or viewer may certainly disagree with or disregard the speaker's message, that does not mean that the audience may gag the speaker.

## NO CAPTIVE AUDIENCE

People using the public streets and sidewalks outside abortion businesses are not a captive audience. Pet. Br. § V(E). *See also* Brief of Family Research Council; Brief for the AFL-CIO at 26-28. Some of respondents' own amici readily concede as much. ACLU Br. at 16-17 & n.15 ("there are significant dangers to



applying the `captive audience' doctrine to a quintessential public forum"). Respondents nevertheless contend that the captive audience doctrine applies to people coming to and going from abortion facilities. Resp. Br. at 44-45. But *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), declared that the pregnant woman has a "right to make the ultimate decision, not a right to be insulated from all others in doing so," *Casey*, 505 U.S. at 877 (joint opinion). Respondents' reliance upon an isolated quotation out of context from *Madsen* is unavailing. As Judge Meskill explained below,

> *Madsen* . . . cannot be read as support for the use here of the "captive audience" doctrine. The *Madsen* Court simply recognized that women *in* the clinic were "held `captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Pet. App. A-64 n.5 (Meskill, J., dissenting) (emphasis in original). *Madsen* did not purport to revolutionize First Amendment jurisprudence by deeming pedestrians in the public forum a "captive audience."

## IMPORTANCE OF CONSTITUTIONAL STANDARDS

Petitioners analyzed in detail the rigorous constitutional standards governing speech-restrictive injunctions after *Madsen*. Pet. Br. § III. Respondents reject this analysis, opting instead for an open-ended "flexible" constitutional standard. Resp. Br. at 28-29. But replacing firm constitutional requisites with pliable, formless analysis yields a flaccid and, ultimately, ineffective First Amendment. "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those

moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 64 U.S.L.W. 4706, 4719 (U.S. June 28, 1996) (SOUTER, J., concurring).

> Indeed, the creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day.

*Id.* at 4722 (KENNEDY, J., joined by GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part). Doctrinal firmness is especially important to cases like this, where "[t]he underlying substantive issue . . . generates . . . a kind of `hydraulic pressure' that motivates ad hoc decisionmaking." *Leavitt v. Jane L.*, 64 U.S.L.W. 3834, 3836 (U.S. June 17, 1996) (STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., dissenting).

Respondents suggest that *Madsen* should not be read as requiring initial resort to measures that do not restrict free speech. Resp. Br. at 28-29. But this requirement predates *Madsen* and reflects a fundamental tenet of First Amendment jurisprudence: speech cannot be restricted unless *necessary* to further a sufficiently strong countervailing interest. *Cf. United States v. O'Brien*, 391 U.S. 367, 377 (1968) (restrictions on expressive conduct may be "no greater than is essential"); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084-88 (1994) (restriction on commercial speech may be "no more extensive than necessary"); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (time, place, and manner regulations in public fora may eliminate "no more than the exact source of the `evil'").



*Madsen* reiterated this First Amendment theme when it required that injunctions "burden no more speech than necessary," 114 S. Ct. at 2525. Restrictions on *speech* cannot be necessary if prohibitions on *misconduct* suffice. One cannot know whether a lesser, speech-protective measure could work if one resorts first to anti-speech measures. If recalcitrant lawbreakers defy injunctive restrictions on misconduct, the proper remedy is a contempt prosecution, not a broader injunction. *Cf.* Amicus Brief of Life Legal Defense Fndn. at 12-13.

When the problem is misconduct (as respondents assert) and not the speech itself, the first measure must target the misconduct. To do otherwise would indulge the bizarre and prejudiced assumption that the defendants will not comply with an injunction restricting their *conduct* but will comply with an injunction restricting their *speech*.

## DIRECT RESTRAINTS ON SPEECH

*Madsen* did not overrule this Court's precedents subjecting speech-restrictive injunctions to prior restraint analysis. *E.g., Near v. Minnesota*, 283 U.S. 697 (1931); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).[10] Rather, *Madsen* recognized a limited exception for content-neutral injunctions which restrict speech incidentally, in a limited manner, and in response to prior unlawful conduct. 114 S. Ct. at 2524 n.2. *See* Pet. Br. at 22-24.

The present injunction *directly targets speech, not conduct*. The 15-foot fixed buffer and floating bubble zones only bar "demonstrating." Pet. App. A-183. The "cease and desist"

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10. Respondents argue that because the present restrictions were imposed as a "*subsequent* response to lawlessness," prior restraint analysis does not apply. Resp. Br. at 24 (emphasis in original). This is simply incorrect. In both *Keefe* and *Near*, for example, the injunctions which this Court held to be prior restraints were imposed as subsequent responses to past alleged unlawfulness.

requirement applies only to "sidewalk counseling consisting of a conversation of a non-threatening nature." Pet. App. A-184. The order forbids neither physical presence as such, nor physical proximity as such. These injunctive restrictions truly impose "*speech*-free zones" and "*audience* vetoes" on speech.

The buffer zone in *Madsen*, by contrast, forbade mere "entering" in the zone, 114 S. Ct. at 2523,[11] regardless of any attempts to communicate. Thus, while the injunction was still unconstitutional in part, *id.* at 2528, this Court held that it was not a "prior restraint." The present injunction, which restricts only *expression*, cannot fit within the *Madsen* exception.

Furthermore, the challenged restrictions are not content-neutral. What was disturbing about the expressive activities of sidewalk counselors and picketers was *the content of their message*. As Marilynn Buckham, executive director of respondent Buffalo GYN Womenservices, frankly testified:

> And then I will say to the patient, what's the matter? And they'll say, these people outside, you know, are yelling and telling me things, and she'll start to cry. . . . And I've asked them what has been said to them and they said, well, they've told me that, you know, abortion is not a safe procedure, that I could die, that I may not be able to have children anymore. You know, they showed me these pictures of fetuses with, you know, ripping their arms and their legs off. And she said this was a difficult decision to me to make, and this makes it

11. The injunctive language forbidding "demonstrating" in this same zone in *Madsen* was wholly cumulative. Hence, contrary to respondents, Resp. Br. at 38 n.12, *Madsen* – which did not even address the term "demonstrating" – cannot be read to have approved the use of this term, much less to have rejected a vagueness challenge to the word. Tellingly, the district court here was itself unable to define the term "demonstrating". Dkt. 13, pp. 33-34 (Tr. of 9/27/90) (App. A to this reply brief).



> that much more difficult for me.
>
> And she said, I don't feel that I should have to go through this when I – it's no one's business – that's what – what I see is the anger, the resentment that they don't feel that they should have to go through this to get a medical procedure when it's been their own personal choice it should be no one else's business.

Tr. 489-90. *See also* Tr. 517-18. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (and cases cited). As content-based restrictions, the challenged injunctive terms cannot fit within *Madsen*'s limited exception to the prior restraint doctrine. 114 S. Ct. at 2524 n.2.

## NO HEALTH EXCEPTION TO FIRST AMENDMENT

Respondents highlight the supposedly adverse health consequences of free speech outside abortion facilities. Resp. Br. at 15-18. Some amici warn of "the potential physical and psychological harm *caused by [a sidewalk counselor's] communication.*" AMWA Br. at 24 (emphasis added). Amici American College of Obstetricians and Gynecologists *et al.* (ACOG Br.), supporting respondents, virtually argue for a "health exception" to the First Amendment. This Court must reject this line of reasoning.

The "health" argument proceeds as follows: Controversial and upsetting speech causes stress, sometimes severe stress. Stress is bad for health, especially for those undergoing medical procedures or suffering from medical conditions. Therefore, controversial speech can be restricted.

Plainly, acceptance of this argument would open a Pandora's Box of speech limitations. A protest-free world be "safer" in many ways. Pickets outside factories elevate stress for employees who cross the picket line and then, in an agitated condition,

handle heavy machinery at grave risk to life and limb. Strikes outside airport terminals impair the mental concentration of air traffic controllers and pilots, with potentially devasting consequences. Colorful or graphic images on placards distract passing drivers, causing accidents. Large assemblies risk riots or trampling, especially when the topic is a matter of passionate debate.

Furthermore, health concerns do not apply only to site-based protests. The offensive cartoon at issue in *Falwell v. Flynt*, 797 F.2d 1270, 1276-77 (4th Cir. 1986), *rev'd sub nom. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), caused Rev. Falwell to suffer severe emotional distress. The publication of the rape victim's name in *The Florida Star v. B.J.F.*, 491 U.S. 524, 528 (1989), likewise caused her to suffer significant emotional distress. Vitriolic editorials may aggravate heart conditions and nervous disorders in the targets of their caustic criticisms. The outspoken denunciation of human abortion at press conferences and at pro-life conventions surely upsets unsympathetic viewers of news coverage of these events, including some persons scheduled for imminent abortions.

Do these considerations mean that speech that disturbs others to the extent of jeopardizing health thereby loses constitutional protection? Certainly not. *See* Pet. Br. at 21. The framers of the First Amendment saw their share of rhetorical barrages, intimidating treatment of effigies, and "harassing" protests. They presumably knew that such demonstrations seriously disturbed the appetites, sleep, and vital signs of many Loyalists and British agents, perhaps causing some to suffer even severe medical consequences. But the framers nonetheless rejected the "health" of the straitjacket and the censor, in favor of the "hazardous freedom" of the First Amendment, *see Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508 (1969).



Respondents make passing reference to an alleged health risk of delaying abortion in response to protest activities. Resp. Br. at 16. It is certainly true that abortion, as the forcible interruption of the natural state of pregnancy, poses dangers to the woman, as even respondents' amici admit, ACOG Br. at 7 & nn.6-7. But respondent Paul Davis, MD, testified that, at least through fourteen weeks of gestation, "I'm not dealing in the area where a delay would make any difference." Tr. 847-48. Furthermore, respondents themselves have no qualms about delaying their patients' abortions, not only to accommodate their own business schedule (abortions are not done every day of the week), but also whenever *they* conclude the pregnant woman should wait and reconsider:

> Q. Have you ever . . . witnessed a woman who seemed to be less certain of the abortion decision than the parent or partner who was with her? A. Yes. . . . And if I feel in any way as the counsellor speaking to that person that day that she is being strong-armed, I ask them to go home, think about it. *They can always reschedule, they can always come back, but that is not the day for them to have the abortion if I feel – if there's some way that I feel that she does not want this abortion, she's not going to have it.*

Tr. 696-97 (M. Buckham, Exec. Dir. of Buffalo GYN Womenservices) (emphasis added).[12]

PROPER RELIEF

Respondents concede that the present injunction "has become legally and factually stale," Resp. Br. at 48, and "outmoded," *id.* at 49. As petitioners pointed out, the district court has dismissed

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12. Respondents point to two-day abortion procedures in which laminaria is used to dilate the cervix prior to the abortion. Resp. Br. at 16. But a woman can still change her mind, have the laminaria removed, and continue the pregnancy. Tr. 624 (Buckham).

the legal basis for precisely the speech-restrictive provisions at issue. Pet. Br. § IV.[13] This Court should therefore reverse the challenged provisions for lack of supporting interests. *See id.*

Respondents disagree, arguing that the Court should instead dismiss the writ of certiorari as improvidently granted. This would be improper and unwise. First, the injunctive restrictions place ongoing limits on free speech and therefore cause irreparable harm. *E.g. Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). Second, dismissing the writ would leave the Second Circuit's extreme *in banc* opinions in place, prejudicing future First Amendment litigation in this case and in other cases within that circuit. Third, respondents bear the burden of justifying these unprecedented restrictions on speech. If they cannot do so because their legal claims have evaporated and their facts have become "stale," then the injunction must fall.[14]

## CONCLUSION

The judgment below should be reversed.

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13. The absence of a supporting cause of action represents a fatal *constitutional* defect. Pet. Br. § IV. The issue is therefore fairly included in the questions presented here.

14. Respondents also cite *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), where this Court declined to vacate an injunction and instead remanded for a determination whether pendent state claims could support the relief granted. *Bray* reaffirmed the rule that an injunction must rest upon supporting claims. However, in *Bray* this Court did not have before it a First Amendment challenge to the injunctive restrictions. Therefore, simply remanding the matter, while leaving the injunction temporarily in place, theoretically did not burden any free speech rights.



Respectfully submitted,

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August 1, 1996

# APPENDIX

APPENDIX A: Excerpt of Transcript of
Sept. 27, 1990 (dkt. 13)

[33] MR. SAUNDERS: I believe Mr. Schenck has one comment.

REV. SCHENCK: I have two, with your Honor's indulgence.

The first is in regard to page two, item 1(a) trespassing on, sitting in, blocking, impeding, or obstructing access, ingress or egress is understandable. Including demonstrating – and I'm not certain that there is a firm and fast definition of the word "demonstrating" and what that implies, and I imagine that that was probably discussed at length yesterday.

THE COURT: Well, the question came up and I addressed it by saying that the normal, ordinary meaning of that word will apply.

And the discussion went along the line as, well, what is – what does that mean? And it was, I think pretty much clearly said that the individuals themselves [34] know what their activities are: The carrying the signs or whatever. I think that's the way that discussion went.

And the only thing I can tell you on that is that it's – will apply the ordinary meaning of that word. And there's not much more I can tell you other than that. I think we'll have to wait and see what the facts are, if they develop that there's an alleged violation of this order.

REV. SCHENCK: Furthermore, my concern is that

if, for instance, using myself as an example, if I am holding a sign, and an individual who is so described, seeking access to or leaving such facilities, approaches me -- now, this is not necessarily an individual who they have referred to as a "client" or a "woman" or a "mother" or whomever, but just anyone seeking to go in or out – if that individual then dogs me and shadows me, it becomes then my responsibility, as I read this, to move to the back of the bus, so to speak.

In other words, the [35] possibility here of entrapment is very high and very probable. The fact that someone could move purposely in my direction, if I'm expressing my free speech rights of demonstration, and that individual continuously presses in beyond the 15 foot rule, since they are not implicated in this language, then it comes to me or falls upon me to avoid the 15 foot rule.

And in my imagination, what I imagine is either being run away from a piece of property virtually by proximity to an individual who was coming out, let's say of a facility, and closing in on me, as a demonstrator –

THE COURT: You say the foot 15 rule would move as the individual coming out or going in?

REV. SCHENCK: Yes, I understand this to mean that to come within 15 feet of any person seeking access or leaving such facility. So in my opinion, if you're walking three blocks, if they are leaving the facility, then if I can't come within 15 feet of that person, that could be a moving [36] designation, a moving figure.

THE COURT: I don't think that was the intent of



this is to have it moving. I think what we're talking about is that we want to make sure that there is free access. The reason why we came up with the 15 feet was because we were concerned about automobiles, that there be enough room for an automobile to pass freely. It's not a moving 15 feet.

REV. SCHENCK: So in other words, you're speaking of the facility itself?

THE COURT: I think that's what we were talking about yesterday but – there's a doorway, I guess. Let's say that's the doorway right there. We're talking 15 feet from there to go right out to wherever you're going. That person comes to you, my gosh, you would never be able to ever realistically know how to deal with that, if it was a moving length.

It's 15 feet from the entrance. I think you have to apply common sense to this too, and that would not in any way at all be a fair interpretation of what [37] we're talking about.

REV. SCHENCK: Well, I'm glad that you pointed that out, but there is, I think, a very high degree of ambiguity, because even in our discussions here casually, that's not the way we were referring to it, and no one came back to that and said what we're talking about here is 15 feet from an entranceway.

THE COURT: I think everyone is clear on that now.

MS. FINLEY: Yes, I think the intent is quite clear, your Honor, that the – it's in the context of a paragraph that is designed to preserve unimpeded access to a facility.

APPENDIX B: Excerpt of Transcript of
March 26, 1991 (dkt. 88a)
(testimony of Karen Swallow Prior)

[1284] Q. Mrs. Prior, is it your testimony that you have encountered women arriving for scheduled appointments at abortion clinics with boyfriends or male companions?

A. Yes.

Q. And is it your testimony that on some of those occasions it appeared to you that the woman was willing to talk to you, but the man was attempting to prevent you from talking to her?

A. Yes.

Q. Can you give us more specifically what you've seen that leads you to that [1285] conclusion that sometimes a woman is willing to talk to you, but a male companion with her tries to prevent her and you from doing so?

A. Okay. I've seen that in a number of ways. One of the ways is through the body language of the couple. The man attempting to steer and push the woman toward the door, and keep her – keep himself between her and the counsellors.

Another way would be the man accompanying her yelling at us, telling us no, we don't want your information or leave us alone or anything else, while the girl herself, or the woman herself would not be saying anything, or might be looking at us or might be crying and looking very upset. In that case, it's almost impossible for me to determine exactly what the



girl or the woman would want, because the person accompanying her is speaking for her. So it can be in a variety of ways that I perceive pressure.

Q. Have you – in such – on such occasions, have you encountered men who tried to [1286] prevent you from speaking to the woman even though it appeared to you that the woman was willing to speak with you?

A. Yes.

Q. Have you ever had any specific incidents in which one individual in a group told you that they didn't want to talk to you, but before they got into the clinic it turned out that someone else in the group was willing to talk?

A. Yes.

Q. Have you ever seen occasions where a patient that you first encounter continues to walk toward the clinic without stopping, even after you first approached them, and yet at some point before they get to the clinic they do stop and speak to you?

A. Yes.

Q. And under such circumstances have you seen patients who continued walking at first, but before they arrived at the clinic, they stopped and they were willing to take your literature and ask you questions?

A. Yes.

Q. Has that happened on a fairly regular basis?

[1287] A. I wouldn't say a regular basis, no. I'd say occasional.

Q. But you have seen that happen?

A. Yes.

Q. Have you had occasion to witness sidewalk counsellors attempting to counsel patients on days and occasions when no Pro-Choice escorts were present?

A. Yes.

Q. And in your opinion, can you contrast the difference between the two situations?

A. Those two situations are entirely different. When no escorts are present, I can come up to the woman and talk to her in a normal conversational tone and she can respond to me and we can have what I call civilized conversation, and I can explain to her the information that I have. She can tell me either that she does want it or doesn't want it. I'm able to tell immediately how receptive she is to the [1288] information, whether or not it's a good idea to continue counselling with her.

While on the other hand, if escorts are there, it's almost impossible to determine the woman's receptivity to the information because there's usually an escort standing physically between us or and/or shouting, and it's very difficult to make any kind of conversational or eye contact with the woman to determine exactly whether or not she wants to talk to me.

THE COURT: What period of time are you talking about, ma'am?



THE WITNESS: From my experiences from August 1989 through 1990. I've counselled in every –

THE COURT: Through 1990?

THE WITNESS: Right. Well, as I explained before – well, I have been counselling on an occasional basis this semester. So it would include that. But it's only been –

THE COURT: When was the last time you tried to counsel a patient that was going into one of these clinics that you had [1289] this type of an experience?

THE WITNESS: With the escort or without?

THE COURT: With the escort.

THE WITNESS: Not – this past Saturday the one before that.

THE COURT: And what happened then?

THE WITNESS: That was at 1241 Main Street, and on at least one occasion, probably a couple more, a car pulled into the driveway, which was across from the clinic, it was the driveway of the Buffalo Biblical Library, and I attempted to walk over to the car, and it was – the woman had her window down, and my partner handed her the literature, and then her husband, who was driving the car, sped up the car, because at the same time escorts were coming over and directing them to go down the driveway, and the woman was just like looking at us, and she was very upset, and she – I just know she wanted to talk to us. And I know she wanted the information because her window was

down and she was [1290] reaching for it.

Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

(13)

No. 95-1065

# In the Supreme Court of the United States

OCTOBER TERM, 1995

PAUL SCHENCK AND DWIGHT SAUNDERS, PETITIONERS

*v.*

PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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## QUESTION PRESENTED

This case concerns constitutional challenges to two provisions of an injunction prohibiting unlawful obstruction of and interference with access to certain health care clinics at which abortions are performed. The first challenged provision states that petitioners, and others acting in concert with them, may not demonstrate within 15 feet of entrances to respondents' health care clinics, or within 15 feet of persons and vehicles seeking access to or leaving such clinics, except that they may engage in "sidewalk counseling," *i.e.*, nonthreatening individual conversations, by no more than two counselors, with persons entering or leaving a clinic. The second challenged provision states that, in the event that a person who is the object of sidewalk counseling expresses a desire to end the encounter, the counselors must either cease counseling or move at least 15 feet away.

The question presented is:

Whether the injunction provisions challenged by petitioners violate the First Amendment.

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---

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING RESPONDENTS**

---

## INTEREST OF THE UNITED STATES

This case arises out of an action brought by respondents, health care clinics and physicians who provide gynecological services, including abortion services. A federal district court issued an injunction against petitioners and others who had engaged in, and threatened to engage in, wrongs to respondents, including impeding clinic patients and employees from entering the clinic, and intimidating and harassing clinic patients and employees as they arrived at and departed from the clinics. A panel of the court of appeals upheld certain portions of the injunc-

tion, but held two provisions unconstitutional. The court of appeals, sitting in banc, vacated the portion of the panel opinion striking down the two provisions, and held them valid, as modified.

Petitioners maintain that the two provisions violate their First Amendment rights. The Court's resolution of the constitutionality of these injunction provisions could affect the scope of injunctive relief available under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248 (Access Act), which prohibits, *inter alia*, individuals, through force, threat of force, or by physical obstruction, from intimidating or interfering with any person because that person is, or has been, obtaining or providing reproductive health services. 18 U.S.C. 248(a)(1). The Attorney General has primary responsibility for enforcing the Access Act and injunctive relief is specified as a remedy available under the Act. 18 U.S.C. 248(c).

In addition, the instant case constitutes the first review by this Court of a decision applying the standard established by the Court in *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), for determining the constitutionality of injunctions that are challenged on First Amendment grounds. The United States participated as amicus curiae in *Madsen* in light of its interest in seeing that adequate judicial relief is available against those who illegally impede access to medical clinics providing abortion-related services, and its interest in preserving the ability of its citizens to exercise their First Amendment rights in a manner compatible with the rights of others. The same interests support the United States' participation in the instant case.

## STATEMENT

1. a. Respondents include physicians, medical centers, and other health care providers, located in western New



York State, that offer family planning and gynecological services, including abortion services, at their health care clinics. Pet. App. A5.[1] Respondents filed this suit against petitioners Rev. Paul Schenck and Dwight Saunders, as well as Project Rescue Western New York, Operation Rescue, Project Life of Rochester, and approximately 50 other individuals who had "engaged in a consistent pattern of illegal conduct at [respondents'] health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of patients and staff." *Id.* at A5, A141.[2] Respondents brought six state law claims against petitioners, including tortious interference with business, trespass, intentional infliction of emotional harm, tortious harassment, false imprisonment, and violation of N.Y. Civ. Rights Law § 40-c (McKinney 1992) and N.Y. Exec. Law § 296 (McKinney 1982 & Supp. 1990), as well as one federal law claim, alleging a conspiracy to deprive women seeking abortions of the equal protection of the laws and the equal privileges and immunities of citizenship, in violation of 42 U.S.C. 1985(3).

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[1] The Respondent health care providers include Buffalo GYN Womenservices, P.C.; Erie Medical Center; Paul Davis, M.D.; Shalom Press, M.D.; Barnett Slepian, M.D.; Morris Wortman, M.D.; Highland Obstetrical Group; and Alexander Women's Group. Pet. App. A5. Respondent Pro-Choice Network of Western New York is a not-for-profit organization, based in Buffalo, New York, that is dedicated to maintaining legal and safe access to family planning and abortion services in western New York State. *Ibid.*

[2] Petitioners Paul Schenck and Dwight Saunders are the only named defendants who filed a petition for a writ of certiorari. All of the defendants stipulated below, however, that any unlawful conduct found to have been performed by any of them could be attributed to all of them for purposes of the preliminary injunction. Pet. App. A136; Transcript of Preliminary Injunction Hearing, March - April, 1991 (Tr.) 5-7, 919-920. Accordingly, we use the term "petitioners" to refer to all the named defendants collectively.

Pet. App. A141-A142. The court entered a temporary restraining order (TRO) and, ultimately, the preliminary injunction at issue here.

The court's preliminary injunction was based on detailed findings of fact and conclusions of law, and supported by record evidence, including the following: Petitioners' most obstructive conduct involved full-scale, physical blockades of respondents' clinics. Pet. App. A145-A146. During a full-scale blockade, a large number of demonstrators "trespass on the clinic property and sit or lay in the entrance of the clinic in an attempt to block access to and egress from the clinic." *Id.* at 146. Many demonstrators "lock arms or chain themselves together in order to make it more difficult for police to remove them." *Ibid.* Respondents' clinics were often the victims of such blockades by petitioners. "On many of those occasions, the operation of the targeted facility was effectively stopped or significantly hampered." *Ibid.*; Tr. 8, 437.

Petitioners conducted demonstrations, at other times, that fell short of full-scale blockades but, nonetheless, significantly obstructed and impeded access to respondents' facilities, including "demonstrating and picketing around the entrances of clinics," and "harassing patients and staff entering and leaving the clinics" on days when abortions were scheduled to be performed. See Pet. App. A146-A147. Petitioners would "frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities." *Id.* at A147; see also Tr. 171, 173, 185-186, 276-277, 343-344, 894-895. The large number of demonstrators made it difficult for people seeking access to the clinics to find the driveway and the entrances, intimidated drivers, and created danger to occupants of the approaching cars and to demonstrators. See Pet. App. A147; Tr. 187-190, 344-346, 352-356. Some vehicles simply "could not



get in" the clinic driveways because the demonstrators stood in their way. Tr. 191, 221, 393. Demonstrators "would almost invite somebody to hit them or pretend that they had been hit," by dropping to their knees in front of a car, or by "falling on top of the hood of the car." Tr. 83, 89-93, 185-186, 190, 343. As a result, some patients were forced to delay their appointments, causing increased risks to their health. Pet. App. A147, A152-A153.

Petitioners also engaged in "sidewalk counseling," in which sidewalk counselors proffer literature to women entering health care facilities and try to convince them not to have abortions. Pet. App. A147-A149. Sidewalk counselors would crowd patients, walking as close to the person as possible, sometimes making physical contact with them. *Id.* at A148; Tr. 55, 275. The counselors also sometimes went beyond attempts at mere persuasion and harassed and intimidated patients and escorts. Pet. App. A148. Such harassment included physically interfering with the free movement of persons approaching or leaving the clinic, surrounding such persons, making it "very difficult sometimes for them to even walk," or "pushing, shoving, [or] grabbing" them. Tr. 174, 263-264, 271, 276, 280-282, 290-293, 303, 397; see also Tr. 272-274, 293-294, 339. When a patient arrived in a car, counselors would try to stop the car, hang onto it, chase it, scream in the windows, and impede its progress. Tr. 172-173, 290, 355-356. When a person who was targeted by sidewalk counseling expressed a desire to be left alone, the counselors usually would not leave them alone, Pet. App. A148, and would continue to pursue the person to the clinic door, sometimes through a lobby and into and up an elevator. Tr. 56, 58-63, 209-212, 215, 263, 270-271, 275-276, 295; see Pet. App. A148. Other demonstrators sometimes joined the counselors as they followed the person seeking access to the clinic, so that by the time the person reached the entrance,

the person sometimes had "as many as six to ten people around her." Tr. 276. Counselors would yell and scream at the persons entering the clinic. Tr. 175-176, 276, 357-358.

b. In the fall of 1990, petitioners announced that they were going to conduct a full-scale blockade at an undisclosed clinic in western New York State on September 28, 1990. Pet. App. A142.[3] On September 24, 1990, respondents filed the instant suit. After hearing and argument, the district court entered a temporary restraining order (TRO) that precluded petitioners from: (a) "trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities," except that sidewalk counseling of an individual, by not more than two persons, was allowed so long as it consisted of a conversation "of a nonthreatening nature"; (b) "physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed," except that the same type of sidewalk counseling was allowed; and (c) "making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of a health care facility where abortions are performed in the Western District of New York." J.A. 23-24. The TRO specified that, in the event a person who is the object of counseling wants not to have counseling, or wants to leave

[3] Respondents also alleged that petitioners intended to engage in "rescues" at clinics in the area during October of 1990, which petitioners had deemed National Rescue Month. J.A. 33-34. As petitioners note, "rescues" commonly consist of sit-ins or blockades. Pet. Br. 3 n.3.



or to walk away, the counselors "shall cease and desist from such counseling of that person." *Ibid.*

Following issuance of the TRO, petitioners did not conduct the blockade announced for September 28, 1990, and instead engaged in a non-obstructive, peaceful demonstration. Pet. App. A143. With petitioners' consent, the court ordered that the TRO remain in effect until the motion for a preliminary injunction was decided. *Ibid.* Within approximately a month of the issuance of the TRO, petitioners reverted to obstructive and harassing conduct. Although petitioners suspended full-scale blockades until after resolution of the preliminary hearing motion (see note 12, *infra*), they meanwhile resumed demonstrating in a manner that blocked the clinics' driveway entrances, including demonstrators again physically pressing their bodies against vehicles. Tr. 64-66, 92-94, 102-103, 107-108, 347-348, 540-541, 620-621. Petitioners again engaged in sidewalk counseling that included chasing cars in the parking lot, Tr. 66, 156, screaming at patients, Tr. 356-357, and surrounding patients and refusing to let them proceed unimpeded. Tr. 209-210, 214-216, 271-272, 283-286, 295. Petitioners did not obey the TRO's requirement that they approach in groups no larger than two and that they move 15 feet away if the counselee requested. Tr. 99, 176-178, 209-212.[4]

Respondents filed motions for civil contempt against several of the defendants. Pet. App. A143-A144. The district court ultimately held several defendants in civil contempt for having violated the TRO. J.A. 79-101, 102-120, 121-149.

[4] For discussion of other conduct by petitioners that violated the TRO and occurred prior to the hearing on the preliminary injunction, see Tr. 62, 102-103, 181-183, 209-210, 278, 284-285, 295, 347-348, 983, 1007.

c. The district court conducted a hearing on the motion for a preliminary injunction over the course of several days between March 6 and April 1, 1991. Pet. App. A139. The court also considered evidence introduced at the contempt hearings in making a determination on the preliminary injunction. *Id.* at A140. On February 14, 1992, the district court issued a detailed opinion and entered a preliminary injunction. *Id.* at A138-A186.[5] The court found, *inter alia*, that: "[t]he presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger to both the occupants of the cars and the demonstrators themselves," *id.* at A147; "[t]he demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff. This activity causes stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care," *ibid.*; and the purportedly peaceful sidewalk counseling "often erupts into a charged encounter" and counselors "turn to harassing, badgering, intimidating, and yelling at the patients and patient escorts," and "often crowd around patients," *id.* at A148-A149. The court also noted that "[m]any of the 'sidewalk counselors' and other defendants have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." *Id.* at A149.

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[5] Petitioners stipulated that the court could enjoin full-scale, physical blockades (see Pet. App. A134-A135). The court's findings, therefore, focused on other demonstrations and sidewalk counseling that obstructed or impeded physical access. *Id.* at A146 n.5.



The court made numerous findings regarding the adverse health effects of petitioners' obstructive, intimidating and harassing conduct on women seeking abortion services at respondents' clinics. See Pet. App. A87, A152-A153. The court also found that local law enforcement efforts had been shown to be inadequate to respond effectively to the blocked access, harassment and intimidation. *Id.* at A151-A152.

Based on this record, the court concluded that "[t]he irreparable harm flowing [from] defendants' 'rescue' activities, including the medical risks and the denial of constitutionally guaranteed rights, is real and threatens to continue. Without some form of injunctive relief, prospective patients will suffer irreparable harm from delayed access to clinics." Pet. App. A156. The court determined that an injunction was necessary to serve the important government interests in: "safeguarding health"; "maintaining medical standards as regards the performing of abortions"; ensuring that abortions are safe for the patient; ensuring public safety by preventing petitioners "from blocking traffic entering and leaving the clinics" and by prohibiting petitioners from "abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving the clinics"; and ensuring that the constitutional rights of those on both sides of the dispute are protected. *Id.* at A167. The court concluded that respondents had demonstrated a likelihood of success on the merits of their federal claim and two of their state claims, without addressing respondents' additional state claims. *Id.* at A156-A164 & n.11.

The court issued a preliminary injunction, prohibiting petitioners, and those acting in concert with them, from (a) "trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility," including the parking lots of, and other en-

trances to, facilities at which abortions are performed in the Western District of New York; (b) demonstrating within 15 feet of doorway entrances, parking lot entrances, and driveway entrances of such facilities, or within 15 feet of any person or vehicle seeking access to or leaving such facilities, except that sidewalk counseling "of a non-threatening nature" is allowed, if conducted by not more than two persons; (c) "physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed," except that the same type of sidewalk counseling is allowed; (d) making excessively loud noise that injures, disturbs, or endangers the health or safety of a patient or employee of a clinic; and (e) assisting another in taking any of the prohibited actions. Pet. App. A183-A185. The court also provided, as it had in the TRO, that, in the event a person who is the object of sidewalk counseling wants not to have counseling, or wants to leave or to walk away, the counselors must "cease and desist from such counseling" and thereafter be bound by the 15-foot limitation. *Id.* at A184.

The court specified that the 15-foot areas, which it labeled "clear zones," were "necessary to ensure that people and vehicles seeking access to the clinics will not be impeded, and will be able to determine readily where the entrances are located. Further, the 'clear zones' will prevent defendants from crowding patients and invading their personal space." Pet. App. A170.

The district court emphasized that sidewalk counseling was permitted within the 15-foot areas, subject to the requirement that counselors withdraw to a distance of 15 feet at the counselee's request. Pet. App. A170. The court explained that this provision was "necessary in order to protect the right of people approaching and entering the facilities to be left alone." *Id.* at A171, citing *Rowan* v.



*United States Post Office Dept.*, 397 U.S. 728, 736 (1970) ("the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"); 397 U.S. at 738 ("no one has a right to press even 'good' ideas on an unwilling recipient"). The court acknowledged that the unwilling listeners in this case were on a public sidewalk or street where a person generally can avoid unwanted speech by averting their eyes or walking away. Pet. App. A173. The court found, however, that, in light of petitioners' aggressive conduct, persons seeking access to respondents' clinics have been unable to avoid petitioners' speech because averting their eyes or covering their ears is inadequate, and walking away unimpeded is not possible. *Id.* at A173-A174.

The court reaffirmed that, notwithstanding the injunction, petitioners still are able to demonstrate "in full view of people going into the clinics or just passing by." Pet. App. A176. And, with regard to the individuals entering the clinics, petitioners may approach and counsel, subject to moving away 15 feet if so requested. Petitioners, however, still can address such individuals from that distance. *Ibid.*[6]

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[6] While an appeal from the issuance of the injunction was pending in the court of appeals, this Court decided *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In *Bray*, the Court held that, in order to make out a Section 1985(3) claim, a plaintiff must make a showing of an invidiously discriminatory, class-based animus underlying the interference with protected rights, and that plaintiffs could not make out such a claim against abortion demonstrators based merely on their opposition to abortion because that opposition does not equate with an animus against women as a class. In light of that ruling, petitioners moved for dismissal of the case. The district court dismissed the Section 1985(3) claim, but retained jurisdiction over the remaining state law claims and refused to vacate the preliminary injunction. *Pro-Choice Network* v. *Project Rescue*, 828 F. Supp. 1018 (W.D.N.Y. 1993); Pet. App. A15. Petitioners' appeal from this order

2. A panel of the court of appeals upheld the validity of the district court injunction except with respect to the 15-foot clear zone and the provision requiring sidewalk counselors to withdraw to a distance of 15 feet. Pet. App. A80-A109.[7] The panel held that the government interests in the safe performance of abortions, public safety, and protection of the parties' constitutional rights were "quite sufficient to justify an appropriately tailored injunction to protect them." *Id.* at A99, quoting *Madsen*, 114 S. Ct. at 2526. The panel concluded that, based on the record before the district court at the time it issued the preliminary injunction, the 15-foot restrictions and the requirement that sidewalk counselors move 15 feet away, at the request of a counselee, burdened more speech than necessary. Pet. App. A102, A104.

The court of appeals granted rehearing in banc, limited to whether the court of appeals erred in invalidating those two provisions of the injunction. Pet. App. A16. The in banc court vacated the portion of the panel opinion striking down the two provisions and affirmed the validity of the provisions, as modified, because they do not burden more speech than necessary to serve several significant government interests. *Id.* at A1-A78.

In his opinion for the court, Judge Oakes agreed with the panel regarding the significant government interests that are served by the injunction (ensuring safety of medical procedures, public safety, and access to abortions), and agreed that those interests are sufficient to justify an

was considered by the court of appeals, together with the appeal from the issuance of the preliminary injunction, and was rejected. *Id.* at A83, A90.

[7] The court of appeals rejected, as either meritless or improperly preserved, numerous other arguments. See Pet. App. A91-A93, A105-A108.



injunction appropriately tailored to protect them. Pet. App. A18-A19. The in banc court concluded that the 15-foot zones were no broader than necessary to protect the health and well-being of patients, in light of the record in this case. It emphasized the health care functions of the facilities involved, the extensive record of petitioners' harassment and intimidation of patients and the adverse medical consequences of that conduct, the adverse medical consequences that result from delays in receiving treatments related to abortions, the limited size of the 15-foot area, which enables petitioners to continue to "picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by," and the ability of petitioners to attempt to engage in sidewalk counseling. *Id.* at A23-A26. The court concluded that the "injunction does not hamper [petitioners'] message, only [their] intimidating method of demonstration." *Id.* at A25.

The in banc court also upheld the provision that permits individuals to refuse counseling within 15 feet, Pet. App. A26-A33, emphasizing that the purpose of the provision is not, as petitioners suggest, "to suppress speech because of the anxiety its content produces in its audiences, * * * but rather to provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators"—"it is the demonstrators' physical proximity which is regulated rather than their message." *Id.* at A30 (citations omitted); see also Tr. 301.[8] The court

[8] The court ordered that the district court, on remand, clarify in the injunction that, in order for a person being counseled to cause counselors to move away 15 feet, the person must verbally or nonverbally indicate her unwillingness to be counseled. Pet. App. A29. The court pointed out that, to the extent petitioners contend that other aspects of the injunction may need clarification, those matters are addressable by the district court upon petitioners' motion. *Id.* at A30 & n.5.

affirmed the district court's finding that the provision requiring counselors to move away 15 feet was necessary, not only to protect the right of access to abortions, but to provide persons seeking access to the clinics the ability to walk away from the unwanted speech which, otherwise, would not be possible because of petitioners' invasive conduct. *Id.* at A31-A32.

In a concurring opinion, also joined by a majority of the court, Judge Winter concluded that the challenged provisions should be upheld because "the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs." Pet. App. A37-A45. Judge Jacobs filed a concurring opinion in which he stressed that the injunction was justified by the government interests in public safety, the free flow of traffic on public sidewalks, and property rights. *Id.* at A46-A48. Judge Meskill, the author of the original panel opinion, filed a dissenting opinion, disagreeing with how the court applied the *Madsen* standard to the facts of this case. *Id.* at A48-A72. Judge Altimari, the other member of the original panel majority, also filed a dissenting opinion indicating his agreement with the panel's initial conclusion. *Id.* at A72-A78.

## SUMMARY OF ARGUMENT

The trial court's preliminary injunction is consistent with the First Amendment because it serves significant government interests and burdens no more speech than necessary in order to serve those interests. *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516, 2525 (1994). The injunction was entered in response to petitioners' record of unlawful obstructive, intimidating, and harassing conduct at respondents' reproductive health facilities, including full-scale blockades that had shut down targeted



facilities, as well as conduct that obstructed the pathways to respondents' facilities, and crowded, harassed, intimidated and surrounded persons and vehicles seeking access to the facilities. The preliminary injunction serves the significant government interests in prohibiting conduct that interferes with patient access to health care providers and that disrupts public safety.

Neither of the challenged provisions burdens more speech than necessary in order to serve the significant government interests. One provision states that petitioners, and others acting in concert with them, may not demonstrate within 15 feet of entrances to the medical facilities, or within 15 feet of persons and vehicles seeking access to or leaving such facilities, except that they may engage in sidewalk counseling, *i.e.*, nonthreatening conversation by no more than two people with persons entering or leaving a facility. The first of these restrictions is necessary to ensure access to the clinics; the second is necessary to enable people to determine the location of the clinic entrances and to reach those entrances. These two restrictions respond to petitioners' previous obstructive, intimidating, and harassing conduct —conduct that had continued after entry of a TRO. It is important to note that the injunction permits petitioners to continue to conduct demonstrations within the hearing and sight of all persons entering, leaving or passing by the clinics. The 15-foot clear zone is less than half of the size of the 36-foot zone upheld by the Court in *Madsen*, does not exclude all speech, and was fashioned with the problems of vehicular traffic and the need for visibility of clinic entrances in mind.

The other challenged injunction provision requires that, in the event that a person who is the object of close-up sidewalk counseling expresses a desire to end the encounter, the counselors must move at least 15 feet away.

This provision is necessary to further the government's interest in preventing face-to-face encounters from escalating into incidents, such as those reflected in the record, in which sidewalk counselors surrounded persons seeking access to the clinics in an intimidating and obstructive manner, and grabbed, pushed and shoved them. The provision also serves the government's interest in ensuring that the persons seeking access to the clinic have the physical ability to walk away from unwanted speech. The provision does not prohibit petitioners from approaching and initiating counseling. Moreover, even when a counselee requests that the counselors move away, counselors may continue to communicate from a distance that is within the hearing of the counselee. Requiring withdrawal to a distance of 15 feet after an individual request is much less burdensome than the no-approach zone struck down in *Madsen*, which precluded protesters from approaching persons seeking access to the clinic absent an affirmative request from that person, and which extended to a distance of 300 feet from the clinic involved in that case.

## ARGUMENT

The validity of the preliminary injunction in this case is determined by the standard set forth by the Court in *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). In *Madsen*, the Court concluded that content-neutral injunctions affecting speech in traditional public fora, such as the injunction at issue here, present First Amendment concerns distinct from those raised by legislatively imposed restrictions on the time, place, and manner of speech. See *id.* at 2524-2526. Because injunctions are imposed by a particular court and directed at the conduct of identified individuals, they "carry greater risks of * * * discriminatory application than do general



ordinances." *Id.* at 2524. At the same time, however, the Court recognized that injunctions can be better tailored by a court to afford more precise relief than can a generally applicable statute. *Ibid.*; see also *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 309-310 n.22 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large.").

Because of these differences, the Court held that the "standard time, place, and manner analysis is not sufficiently rigorous" to evaluate the constitutionality of a content-neutral injunction in a public forum, but that the strict scrutiny applied to content-based restrictions also is inappropriate. See *Madsen*, 114 S. Ct. at 2525-2526. The Court held that a court "must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 2525. The court of appeals correctly held that the challenged injunction provisions in this case satisfy that standard.[9]

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[9] At times, petitioners appear to treat Judge Winter's opinion, concurring in the result, as if it is the opinion for the in banc court of appeals. See, *e.g.*, Pet. Br. 14; Pet. 8-9; see also Br. of Amicus AFL-CIO 3-4, 13-30. Petitioners correctly point out that more members of the court joined Judge Winter's concurring opinion than joined Judge Oakes' opinion for the court. Pet. Br. 13. Judge Oakes' opinion for a majority of the in banc court of appeals, however, constitutes the judgment subject to review by this Court. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (the Court "reviews judgments, not opinions"). The reasoning of that opinion is fully sufficient to support the court of appeals' judgment. Accordingly, we address our arguments to that judgment and opinion.

## THE CHALLENGED PROVISIONS OF THE PRELIMINARY INJUNCTION SERVE SIGNIFICANT GOVERNMENT INTERESTS AND BURDEN NO MORE SPEECH THAN NECESSARY

### A. The Prohibition Against Petitioners Demonstrating Within 15 Feet Of Clinic Entrances, Or Within 15 Feet Of Vehicles And Persons Seeking Access To Or Leaving The Clinics, Furthers Significant Government Interests

1. The district court crafted its preliminary injunction in response to the ongoing obstructive, intimidating, and harassing conduct of petitioners. Before the issuance of the TRO in this case, petitioners had conducted full-scale, physical blockades that had essentially shut down several of respondents' health care facilities. See Pet. App. A146. Petitioners' blockade planned for September 28, 1990, "failed to take place only because the district court issued its TRO enjoining the blockade on the day before it was scheduled to occur." Pet. App. A22.

Even after the TRO, petitioners temporarily suspended only their full-scale blockades and continued to engage in other types of demonstrations that interfered with access to the clinics in violation of the TRO. See page 7 and note 4, *supra*. Several of the defendants were held in contempt for violating the TRO. See page 7, *supra*. The district court specifically found that petitioners had not been deterred by the threat of arrest and conviction under state law, even though many of them had been arrested for unlawful harassment "on more than one occasion." Pet. App. A149, see also A151. Petitioners' demonstrations, both before and after issuance of the TRO, included many of the same types of obstructive conduct that formed the basis for the injunction in *Madsen*, including demonstrators standing in clinic doorways and driveways and



sidewalk counselors crowding and surrounding would-be clinic patients.

2. In light of this record, the courts below correctly found that injunctive relief was necessary to protect "several significant government interests." Pet. App. A167.[10] The interests include: "safeguarding health," "maintaining medical standards as regards the performing of abortions," ensuring the protection of the constitutional rights of both parties, including access to abortions, and ensuring public safety and the free flow of traffic. *Ibid.*; *id.* at A18-A19, A46-A48. See *Madsen*, 114 S. Ct. at 2526 (government's interests in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," "ensuring the public safety and order, * * * promoting the free flow of traffic on public streets and sidewalks," protecting property rights, and

[10] Petitioners contend (Pet. Br. 15-16, 31-34) that the preliminary injunction was not necessary to serve any significant government interest because respondents' claim under 42 U.S.C. 1985(3) was dismissed by the court in light of *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), see note 6, *supra*, and the remaining state law claims (trespass and state civil rights statute) do not support the relief granted. Petitioners do not present this issue in their petition as a ground for reversing the court of appeals, see Pet. i-ii, and the question was not addressed by the court of appeals because it presented a question of state law that had not been raised in the district court. Pet. App. A94-A95. In the court of appeals' view, "the district court should have the first opportunity to determine, on proper application of the parties, both whether the injunction exceeds its state law basis and whether, if so, other state law or federal law bases exist for this injunction." *Id.* at A94; see also *id.* at A16 (en banc opinion agreeing with panel). We agree, and for those reasons, believe that the issue is not properly before this Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 533-538 (1992); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). Moreover, respondents correctly suggest that it would be appropriate for the Court to dismiss the writ as improvidently granted rather than rule on this issue. See Resp. Br. 47-48.

preserving the medical privacy of patients, were found to be "quite sufficient to justify an appropriately tailored injunction to protect them").[11]

The significance of the government's interest in ensuring access to reproductive health care, including abortion services, is further evidenced by Congress's recent enactment of the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-259, 198 Stat. 694, 18 U.S.C. 248. In order to protect the government's interests in ensuring safe and unobstructed access to abortion services, in light of a history of obstructive and intimidating conduct aimed at interfering with such access, Congress enacted the Access Act to provide criminal and civil sanctions against anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. 248(a)(1). The Attorney General, state Attorneys General, and individual persons aggrieved by violations of the Act, are authorized to bring civil actions under the Act to obtain relief, including "temporary, preliminary or permanent injunctive relief." 18 U.S.C. 248(c)(1), (2) and (3).

It is clearly established that ensuring public safety at health care facilities is a legitimate state objective. See

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[11] Petitioners contend (Pet. Br. 22-26) that the challenged portions of the injunction here constitute an unlawful prior restraint. The court of appeals correctly held (Pet. App. A95-A98) that this Court's reasoning in *Madsen* rejects that argument because the injunction here is content-neutral and restricts, but does not ban, particular expression. *Id.* at A95 n.5, citing *Madsen*, 114 S. Ct. at 2524 n.2.



*NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979) (upholding prohibition on labor soliciting in areas of hospital associated with patient care); *Roe* v. *Wade*, 410 U.S. 113, 150 (1973) (State has an interest in seeing that "abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient"); *Medlin* v. *Palmer*, 874 F.2d 1085 (5th Cir. 1989) (upholding local ordinance forbidding operation of loudspeaker or sound amplifier within 150 feet of, *inter alia*, any hospital, nursing home, or facility that provides surgical services on an outpatient basis).

The government's interest in ensuring the free flow of traffic on streets and sidewalks, access to buildings, and protection of property rights also justifies regulation of petitioners' demonstrations. See *Heffron* v. *ISKCON*, 452 U.S. 640, 650 (1981) ("State's interest in protecting the 'safety and convenience' of those using a public forum is a valid governmental objective"); *Cameron* v. *Johnson*, 390 U.S. 611, 616 (1968) (upholding statute that prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" county courthouses); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."); *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."); *Schneider* v. *State*, 308 U.S. 147, 160 (1939) ("[m]unicipal authorities * * * have the duty to keep their communities' streets open and available for movement of persons and property,

the primary purpose to which the streets are dedicated"); *Ibid.* ("group of [leaflet] distributors could not insist upon a constitutional right to form a cordon across a street and to allow no pedestrian to pass who did not accept a tendered leaflet").

In determining whether injunctive relief is necessary to meet the government's interest in ensuring unobstructed access to health care facilities that have been obstructed by particular defendants in the past, a court is entitled to draw inferences about the future conduct of those defendants, based on their past conduct. See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 295 (1941) (recognizing that, in framing an injunction against picketing, court may "base protection against future coercion on an inference of the continuing threat of past misconduct"). Accordingly, the district court here was entitled to take into account the nature of petitioners' past unlawful actions in "fashion[ing] appropriate restraints on the [defendants'] future activities * * * to avoid a recurrence of the violation." *National Soc'y of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978).[12]

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[12] Indeed, the district court's "inference of the continuing threat of [defendants'] past misconduct," *Milk Wagon Drivers Union*, 312 U.S. at 295, was proven accurate. Although petitioners suspended full-scale blockades after the TRO and pending the preliminary injunction hearing, see Pet. App. A146 n.5, they resumed blockades after the issuance of the preliminary injunction, in violation of the injunction. See *In re Slovenec*, 799 F. Supp. 1441, 1446 (W.D.N.Y. 1992) (district court appointing special prosecutor to pursue criminal charges against certain defendants who were among approximately 75 other uncharged persons who violated the preliminary injunction against blockades during Spring of Life on April 24, 1992); see also *Pro-Choice Network* v. *Project Rescue*, 828 F. Supp. 1018, 1029 (W.D.N.Y. 1993) (discussing charges of criminal contempt against various defendants for violating preliminary injunction on April 17, 24, and May 1, 15, 1993). In upholding the injunction, however, the court of appeals limited its consideration to the record facts before the district court at the time of the issuance of the preliminary injunction. Pet. App. A17 n.3; see also *id.* at A101 n.6.



Given the history of petitioners' conduct, the district court correctly concluded that the limitations on demonstrations within 15 feet of the entrances to respondents' clinics, and their parking lots and driveways, and within 15 feet of people and vehicles seeking access to and leaving the clinics, were necessary to guard against obstruction, intimidation and harassment, and to ensure access to the clinics, the safe performance of abortions, and the protection of patients' health. See Pet. App. A23-A24. Cf. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (noting that "[d]ecrees of * * * generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown"). The district court specifically noted that the 15-foot limitation on demonstrations was necessary to secure unfettered access to the clinics and to ensure that people and vehicles seeking access "be able to determine readily where the entrances are located." Pet. App. A170. See, *e.g.*, Tr. 187-188, 344, 353 (because of demonstrators standing across the driveways, some women seeking access to the clinics could not find the clinics); Tr. 191, 221 (some drivers who found the facilities "could not get in" because the demonstrators stood in their way).[13]

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[13] Petitioners contend (Pet. Br. 17, 47-48) that the preliminary injunction provision is unconstitutionally vague because they "cannot know with any certainty what the term 'demonstrating' includes." Petitioners did not raise this issue below and it, therefore, is not fairly included in the questions presented in the petition for certiorari and should not be considered by the Court. See note 10, *supra*. In any event, the term "demonstrating" is so common that "person[s] of ordinary intelligence" can reasonably know what it prohibits. See

### B. The Prohibition Against Petitioners Demonstrating Within 15 Feet Of Clinic Entrances, Or Within 15 Feet Of Vehicles And Persons Seeking Access To Or Leaving The Clinics, Burdens No More Speech Than Necessary

1. The preliminary injunction does not establish "speech-free zones," as petitioners suggest (Pet. Br. 45). The provision prohibiting demonstrations within 15 feet of clinic entrances, and within 15 feet of persons and vehicles seeking access to or leaving clinics, does not ban any speech. Instead, the provision limits the manner in which petitioners may speak while standing in that area to sidewalk counseling, with no restrictions whatever on the content of the speech, so long as it is nonthreatening. The provision thus permits "direct one-on-one communication," an important avenue of political discourse, *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988), and one of petitioners' most common methods of communicating. Although petitioners may be required to adjust the proximity of their sidewalk counseling when the counselee requests that they move away, this provision imposes far less of a burden than the injunction provision upheld in *Madsen*, which imposed a 36-foot zone around clinic entrances that no protester could enter. 114 S. Ct. at 2526. Permitting unsolicited sidewalk counseling within the 15-foot area supports the conclusion of the court of appeals that the provision does not burden more speech than necessary.

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*Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); see also *Madsen*, 114 S. Ct. at 2526-2527 (upholding buffer zone restriction on "demonstrating"). Finally, in this case, the context in which the injunction was issued provides ample means of defining the term. See, *e.g.* Pet. Br. 3-4 & n.3 (discussing district court's detailed description of the various types of demonstrations at issue in this case); Pet. App. A145-A151.



See *ibid.*, quoting *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (restrictions "'couched in the narrowest terms that will accomplish the pin-pointed objective' of the injunction").[14]

2. With regard to demonstrations that are prohibited within the 15-foot area, the injunction does not ban that speech either, but simply moves it to a distance of 15 feet — a distance that leaves petitioners well within the hearing and sight of the average person. The provision does not preclude petitioners from making their message known to any of the persons seeking access to or leaving respondents' clinics.

Contrary to petitioners' contention (Pet. Br. 48), the 15-foot limitation on demonstrations is directly related to the government's interest in ensuring unimpeded access to the health care facilities. The district court chose 15 feet

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[14] As the court of appeals observed, the injunction here is in some ways narrower and in some ways broader than the buffer zone provision in *Madsen*. Pet. App. A21. The area here (15 feet) is substantially smaller than that in *Madsen* (36 feet), and sidewalk counseling is permitted here, whereas the *Madsen* zone excluded all protesters, even if a person indicated a willingness to speak with them. The area here is broader to the extent it applies around people and vehicles seeking access to and leaving the clinics. Petitioners contend (Pet. Br. 49) that there is no way to know where the injunction applies because they do not know who is a person seeking access to, or leaving, a facility, as opposed to who is a passer-by. To the extent petitioners have a genuine concern about this question, such a matter is a proper subject of a motion for clarification in the district court, as the court of appeals pointed out (in response to petitioners' raising this issue at oral argument). Pet. App. A25 n.4 (refusing to address issue of "how far from a clinic a floating buffer zone may reach to protect a person 'seeking access to or leaving' the clinic. This is exactly the type of issue that is best left to case-by-case adjudication by the district court. We are confident that the district court will apply a reasonable geographic scope to the phrase 'seeking access to or leaving.'").

as the required distance because that was the space necessary to "allow an automobile to pass freely." Sept. 27, 1990, TRO Hearing, Tr. 36. The court had before it a variety of evidence about the physical characteristics of respondents' facilities, including photographs, diagrams, and testimony regarding how petitioners' conduct interacted with these geographic factors to obstruct access. See Tr. 23-49, 182-183, 185, 189, 202-204, 257-262, 462, 466-468, 877-879, 966-968, 984, 989, 1004, 1012, 1014, 1049-1052. Petitioners had engaged in obstructive, intimidating, and harassing conduct that had included crowding and surrounding potential patients on the walkways and roadways leading up to clinic entrances, as well as in the immediate vicinity of the entrances. See pages 4-7, *supra*. The 15-foot areas created by the injunction are tailored to the objectives of preventing petitioners from resuming this past conduct. The court's determination warrants deference in this regard. As the Court recognized in *Madsen*, "some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under [the Court's] heightened review." 114 S. Ct. at 2527.[15]

[15] The 15-foot restrictions do not require demonstrators to "flee from approaching pedestrians on pain of contempt," as petitioners claim (Pet. Br. 48-49). All that is precluded in that area are demonstrations other than sidewalk counseling. Petitioners could not be found in contempt simply for standing, in a non-obstructive manner, within that area. Moreover, the court of appeals pointed out that the scenarios posed by petitioners had not occurred and, if they did occur, petitioners could move the district court for any necessary clarification of the injunction. Pet. App. A30 n.5. See note 14, *supra*.



### C. The Provision Requiring That Sidewalk Counselors Move Away From A Person, To A Distance Of 15 Feet, If The Person So Requests, Does Not Burden More Speech Than Necessary

It is well established that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos* v. *Barry*, 485 U.S. 312, 322 (1988), quoting *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 56 (1988). At the same time, the Court has long recognized an individual's right to walk away from, or otherwise reject, speech that he or she does not want to receive. See, *e.g.*, *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 736, 738 (1970) (right "to be left alone"; "no one has a right to press even 'good' ideas on an unwilling recipient"); *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (plurality opinion) (visitor cannot "insert a foot in the door and insist on a hearing"; passer-by may be "offered a pamphlet in the street but cannot be made to take it"); *Schneider* v. *State*, 308 U.S. 147, 162 (1939) (person has right to distribute literature "to one willing to receive it"). Normally, the burden of rejecting speech falls on the particular individual to avert his or her eyes or walk away. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 210-211 (1975), citing *Cohen* v. *California*, 403 U.S. 15, 21 (1971). The solution generally is not to silence the speaker, even where the speaker's message or manner would be repugnant to many or most people. See, *e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 408-409 (1989); *Cohen*, 403 U.S. at 21.

In this case, the district court found that, as a practical matter, persons seeking access to respondents' clinics have been unable to walk away from petitioners' speech because of petitioners' tactics that include surrounding

persons approaching the clinic, as well as sometimes grabbing, touching and shoving them. See Pet. App. A173-A174. In light of this record, the district court imposed limitations on the manner in which petitioners could conduct sidewalk counseling at close range. These limitations also were necessary because the court had found that sidewalk counselors often had "harass[ed], badger[ed], intimidat[ed] and yell[ed] at the patients," and that "[t]hey continue[d] to do so even after the patients signal[led] their desire to be left alone." *Id.* at A148. The Court has recognized that such face-to-face encounters between people in close proximity to one another raise unique risks of duress, harassment, and obstruction. *Madsen*, 114 S. Ct. at 2527; see also *ISKCON* v. *Lee*, 505 U.S. 672, 684 (1992) (noting that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation"); Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856, 1858 n.14 (1988) (discussing social science research "documenting the existence of 'personal space'—an emotionally charged zone surrounding each individual that regulates one's social and physical interactions with others"); *cf. Madsen*, 114 S. Ct. at 2526 (acknowledging that "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstances"). The court therefore required that, in the event a person seeking access to or leaving respondents' clinics expresses a desire not to be counseled, to leave, or to walk away, sidewalk counselors must move at least 15 feet away.

This provision does not, as petitioners contend, "outlaw" all "disinvited communications" (Pet. Br. 35, 36), constitute an "audience veto on speech" (*id.* at 38-39), or an unlawful licensing scheme (*id.* at 39-40). The provision merely enables the counselee to walk away from face-to-face contact; it does not silence any speech— "Once outside this zone, the 'counselor' * * * may continue advocating his or her beliefs to the woman who has refused them, albeit now from a distance of fifteen feet." Pet. App. A29. The provision does not prevent petitioners from expressing their ideas and messages either to the world at large, or to people seeking access to respondents' facilities.



The provision requiring sidewalk counselors to withdraw to a distance of at least 15 feet, after being requested to do so, is not "virtually identical" to the 300-foot no-approach zone struck down in *Madsen*, as petitioners contend. Pet. Br. 34. In *Madsen*, the injunction provided that, within 300 feet of the clinic, the protesters were required to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate,' " by approaching or by inquiring of the defendants. *Madsen*, 114 S. Ct. at 2529. In addition, even if a person expressed a desire to communicate with the protesters there, the protesters could "in no event" come within 36 feet of the clinic. Here, unlike in *Madsen*, the sidewalk counselors are completely free to approach any person and initiate sidewalk counseling. Moreover, even after a person expresses a desire to not receive the counselors' message, the counselors must move away only to a distance of 15 feet, less than half the width of the buffer zone upheld in *Madsen*, a zone that applied even to persons who expressed an interest in receiving the protesters' speech.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1996

(5)

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

No. 1065

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,

*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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**Amicus Brief of Life Legal Defense Foundation In Support of Petitioners**

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## INTEREST OF AMICUS[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass or blocking, sentences consisting of fines, jail time or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

Beginning in approximately 1990, LLDF was called on to assist in a new type of defense. Individuals picketing, leafletting and counseling in parking lots open to the public were sued for trespass, although the California Constitution has been held to protect speech activity on commercial property open to the public. Most of these lawsuits ended in injunctions keeping pro-life individuals off private commercial property, with assurances that the adjacent public sidewalks provided an adequate alternative forum.[2]

By the following year, pro-life individuals across California were being sued to enjoin them from engaging in any speech activity in "speech-free" zones of varying sizes, all of them including substantial portions of the public sidewalk. To date, LLDF has defended and/or

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[1] Counsel of Record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

[2] *See, e.g., Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 C.A.3d 1662, 1674 (1991) ("here, the public sidewalk is located immediately in front of the Medical Center. . . . [Arriving patients] *can simply accept the protesters' literature by rolling down their car windows, [or] slow or stop on the street as they enter the driveway*. . . . Mindful that the right of free speech involves a guarantee of providing a forum so one may reach the minds of willing listeners, the protesters' exclusion from the parking lot has not deprived them of an ample opportunity within the traditional public forum of the public sidewalk to do so") (emphasis added). *See also, Allred v. Shawley*, 232 Cal. App. 3d 1489, 1503-04 (1991) (same).

continues to defend persons who have been preliminarily or permanently enjoined from public forum speech activity at fifteen abortion facilities in California. The speech-free zones range in size from fifteen feet to fifty yards, with most of them structured so as to prevent any personal contact with or leafletting of persons approaching the facilities.

In the wake of these injunctions, as well as recent ordinances restricting speech, LLDF finds itself once again providing legal defense in criminal cases, this time for conduct which up until very recently was not only legal but constitutionally protected. Now the pro-life defendants are being told that their free speech rights have not been infringed because they can still convey their message from across the street, or down the block, or to anyone who chooses to come to them. They are chided for "quibbling over a few feet" in resisting injunctions keeping them 60 feet away from their audience.[3]

LLDF and those associated with it fear that this Court's decision in *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), has created a flawed doctrinal framework for assessing the validity of these injunctive restrictions on speech. LLDF respectfully requests this Court to reconsider its holding in that case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In February, 1994, this Court granted certiorari in *Madsen v. Women's Health Center*. The case was argued on April 28, 1994, and the decision handed down on June 30. 114 S.Ct. 2516 (1994).

At issue in *Madsen* were several provisions of an injunction imposed by a Florida trial court judge, provisions which restricted the speech activities of the defendants at an abortion clinic and at the homes of

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[3] *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629 (1994), vacated and remanded, 115 S.Ct.413 (1994), reaffirmed, 10 Cal.4th 1009, 898 P.2d 402, 43 Cal. Rptr.2d 88 (1995), *petition for cert. filed*, No. 95-0576 (October 6, 1995) (quoting *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d. 681, 686 (9th Cir. 1988).)



clinic employees. The Florida Supreme Court upheld the injunction, applying the "time, place, and manner" test for statutes and ordinances restricting speech in public fora. See *Perry Educ. Ass'n. v. Perry Local Ed. Ass'n.*, 460 U.S. 37, 45 (1983).

Shortly before the Florida Supreme Court decision was handed down, the Court of Appeals for the Eleventh Circuit, in a separate action, ruled the very same injunction was unconstitutional. The court, also applying *Perry*, concluded that the restrictions were content-based and did not satisfy the more stringent criteria for content-based ordinances. *Cheffer v. McGregor*, 6 F.3d 705, 711 (11th Cir. 1993), vacated on rehearing and remanded, 41 F.2d 1421, 1422 (1994) (en banc).

This Court granted certiorari to resolve the conflict between the Florida Supreme Court and the Court of Appeals. 114 S.Ct. at 2523. Unfortunately, in so doing, this Court built on the same fundamental doctrinal error which characterized both of the lower court decisions. Both of the lower court decisions, and consequently this Court's decision, assumed that the validity of the injunction should be tested by considering various governmental interests and balancing them against the particular restrictions. The Florida Court, using the "narrowly tailored to serve a significant governmental interest" test, upheld all the restrictions. The Eleventh Circuit, using the "narrowly drawn to serve a compelling state interest" test, struck down all the restrictions. This Court, using a "burdens no more speech than necessary to serve a significant government interest" test, upheld some restrictions and struck down others.

However, the critical issue in assessing the validity of these injunctive restrictions is not which test should be used for balancing, but what should be balanced. The two lower court decisions and *Madsen* all balanced the defendants' free speech rights against *government* interests. But the government was not a party to the litigation, and never asserted any interests. The injunction should have been tested only against the plaintiffs' private interests.

Had the injunction been limited to providing relief for the *plaintiffs'* interests, the entire issue of restricting defendants' speech in the public forum need never have arisen. By taking on the legislative function of

delineating and protecting governmental interests on public ways, the lower courts have created a legal morass into which the free speech and due process rights of countless individuals are disappearing from sight.

## I. GOVERNMENTAL INTERESTS ARE NOT AT ISSUE IN LITIGATION BETWEEN PRIVATE PARTIES.

### A. *The purpose of injunctive relief is to protect the rights of the plaintiff, not the government.*

In discussing the differences between generally applicable statutes and injunctions, this Court stated: "The parties seeking the injunction assert *a violation of their rights*; the court hearing the actions is charged with fashioning a remedy for *a specific deprivation*, not with the drafting of a statute addressed to the general public." *Madsen*, 114 S.Ct. at 2524 (emphasis added). The Court subsequently noted that, "quite apart from First Amendment considerations, '[] injunctive relief should be no more burdensome to the defendants than necessary to provide *complete relief to the plaintiffs*.' [citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).]" 114 S.Ct. at 2525 (emphasis added).

However, the Court then immediately went on to delineate a test which asks "whether the challenged provisions of the injunction burden no more speech than necessary to serve a *significant governmental interest*." *Id.* (Emphasis added).

If the plaintiff were a governmental entity, as in *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968), this test could logically be applied. However, in the case of a private plaintiff, the abrupt substitution of governmental interests for private rights is contrary to the very principles of equity which the Court earlier enunciated.

Private parties seeking injunctive relief assert their own rights, not those of the government.[4] The duty of the trial court is to "fashion[]

[4] *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 291 (1941) (plaintiffs "brought suit against the Union and its officials to stop interference with the distribution of its products"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891, 894 (1982) (reviewing judgment of damages and injunctive relief upheld on theory of liability for malicious interference with the plaintiffs' businesses).



a remedy for a *specific deprivation*" of the plaintiff's rights, 114 S.Ct. at 2523, not to address the general interests of society. There is no basis, in law or logic, for giving private parties standing to assert governmental interests, nor to grant them relief tailored to serve, not their own interests, but those of the state.

### B. *Asserting governmental interests is not the function of courts.*

Just as it is inappropriate for private parties to assert governmental interests, so, too, courts exceed their jurisdiction when they invoke such interests on behalf of a private party in civil litigation. The function of the judiciary in civil litigation is simply to adjudicate the claims and defenses of the parties before it, be they public or private entities.

As Justice Scalia pointed out in his dissent in *Madsen*, " 'significant government interests' are general, innumerable, and omnipresent." 114 S.Ct. at 2542. These interests, in the diverse interactions between citizens, will often conflict with one another. It is the function of the legislative branch to select, balance, and set priorities among these interests, and to choose the appropriate means for effectuating its decisions.[5] When a governmental action is challenged, it is the function of the judiciary to apply various tests to determine whether the state's chosen means and ends constitute a legitimate exercise of authority, or run afoul of constitutional protections.

[5] For example, a state might weigh the conflicting interests in promoting parental authority and protecting the privacy rights of minors, in deciding whether to require parental consent for abortions. *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). A city might weigh the interest in preventing "visual blight" against that of encouraging political participation in deciding whether to ban the posting of signs. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). A town might balance the interest in protecting residential privacy against that of protecting free speech, in deciding whether to limit residential picketing. *See Frisby v. Schultz*, 487 U.S. 474 (1988).

In *Madsen*, *Pro-Choice Network*, and similar injunction cases, the lower courts have taken upon themselves the legislative function of deciding that some governmental interests need to be protected at the expense of others, e.g., free speech rights must yield to the free flow of traffic. In so doing, they are no longer acting as an impartial judiciary, balancing the interests asserted by the state against the constitutionally protected rights of the individual. Rather, the courts become both the state actors imposing the restriction, and the judges of the constitutionality of the restrictions.[6]

This Court has held that governmental bodies may regulate the fora which they "[hold] in trust for the use of the public," *Hague v. CIO*, 307 U.S 496, 516 (1939). While speech activities in such fora are indisputably constitutionally protected, states are permitted to regulate and even restrict some of these activities, to serve various public interests. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

In contrast, nothing in this Court's First Amendment jurisprudence suggests that the use of such fora may be restricted for the benefit of particular private parties. This Court has never upheld restrictions on free speech rights in public fora imposed to protect a particular individual's interests.[7] *See, e.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (striking down as prior restraint injunction prohibiting distribution of leaflets; "[d]esignating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record").

[6] It is hardly surprising, under these circumstances, that when a judge issues an injunction effectuating his ordering of governmental interests, the injunction is frequently applied like an ordinance, even a viewpoint-based ordinance. *See, e.g.*, *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, *supra*, No. 95-576, Reply to Brief in Opposition, at 5-6 (challenged injunction has been held to bind "anyone doing what those named in the injunction were prohibited from doing"); *Madsen*, 114 S.Ct. at 2540 (Scalia, J. dissenting) (transcript of judge stating that "in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic"); Petition for Writ of Certiorari, *Alf v. Florida*, 105 S.Ct. ____ (1995) (No. 94-1951) (denial of certiorari) (nonparties held in contempt of *Madsen* injunction where evidence of "in concert" actions was common pro-life viewpoint). *See also Planned Parenthood v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157, 165 (1990) (enjoining class of persons consisting of "persons picketing [on specified public streets] who have been personally served with this order" but not requiring action in concert).



The instant case provides an excellent example of the pitfalls of intermingling governmental interests with private interests. Respondents herein originally brought one federal cause of action, under 42 U.S.C. § 1985(3), as well as six state law causes of action. In issuing the prelimimary injunction, the district court ruled that the respondents were likely to prevail on the federal claim as well as on a parallel state civil rights claim, and on their state trespass claim. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1431-2 (W.D.N.Y. 1992). The court did not address the remainder of respondents' state law claims. 799 F. Supp. at 1432 n.11.

After this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), the lower court dismissed the federal cause of action, but exercised pendent jurisdiction over the state law claims. *Pro-Choice Network v. Project Rescue*, 828 F. Supp. 1018 (W.D.N.Y. 1993). Since the state civil rights claim was predicated on the same alleged violation as the federal claim, 799 F. Supp. at 1431, this state claim, too, no longer retains any validity after *Bray*. Thus, the only cause of action now underlying the intricate speech restrictions imposed by the district court is a state law trespass claim.

Though petitioners raised these arguments in their appeal to the Second Circuit, the Second Circuit panel declined to address them because petitioners had not raised them at the trial court. *Pro-Choice Network v. Schenck*, 67 F.3d 359, 367-8 (2d Cir. 1994). Rather than remanding for consideration of these crucial non-constitutional questions, the Second Circuit proceeded to determine the constitutional

[7] Again, this Court held the restrictions in *Madsen* to be justified by a combination of governmental interests. 114 S.Ct. at 2526.

question of whether the challenged restrictions were justified by significant *governmental* interests.[8]

If trial courts limited themselves to considering only the rights and interests asserted by party-plaintiffs (here, freedom from trespass), the relief granted would not encompass restrictions on protected speech in public fora. By tailoring relief to serve governmental interests, the courts not only infringe on free speech rights, but also wreak havoc on the basic structure of our civil litigation process. In effect, the government becomes a *sub silentio* plaintiff-intervenor, whose interests are selectively furthered by the private party plaintiff.[9]

### C. *Adequate private causes of action exist to justify relief which protects access and prevents unlawful interference with patients.*

It is unclear from the lower court opinions in *Madsen* what specific causes of action the plaintiffs asserted.[10] However the Supreme Court of Florida did state that the plaintiffs seeking equitable relief had the burden of showing "that the threatened injury is real." *Operation Rescue v. Women's Health Center*, 626 So.2d 664, 670 (1993). Obviously, this "threatened injury" means an injury to the plaintiffs, not to the commonweal.

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[8] The Second Circuit panel also summarily disposed of petitioners' argument that respondent Pro-Choice Network, a private entity, lacked standing to assert governmental interests. The panel simply asserted, as if it were a self-evident proposition, "Having thus established its standing to maintain its claims against Project Rescue, Pro-Choice was entitled to argue that injunctive relief was a proper remedy because certain governmental interests would be furthered by the issuance of such relief." 67 F.3d at 367. Thus, according to the Second Circuit, as long as a private plaintiff has any valid claim against a defendant, it may also seek whatever injunctive relief may arguably further some *governmental* interest.

[9] Thus, these cases might more honestly be captioned *State ex rel. Abortion Clinic v. Pro-Life Activist*.

[10] Ironically, the complaint was not included in the Joint Appendix filed in *Madsen*. In light of the Court's ruling, the complaint was irrelevant anyway, as the relief was purportedly tailored to serve governmental interests, rather than the plaintiffs' causes of action.



Several causes of action, including trespass, nuisance, and interference with business, could presumably be brought to address the injuries the *Madsen* plaintiffs allegedly suffered. They could rightfully assert their interests in protecting their private property, in protecting the use and enjoyment of that property by themselves and their clients, and protecting their business from unlawful interference.

An injunction which was "no broader than necessary to achieve [these] desired goals," 114 S.Ct. at 2525, could forbid trespass and interference with access. It could also forbid threats and assaults against clinic workers and clients. Depending on the law of the jurisdiction, it might also forbid loud noise which unreasonably disturbs the peace of the plaintiffs and their invitees on their property.

All of these are reasonable restrictions, and ones which the defendants in *Madsen* did not challenge.[11] Only when the trial court expanded the injunction to serve governmental interests, rather than the plaintiffs' interests, did the relief violate the defendants' free speech rights.

### D. Madsen*'s recitation of governmental interests provides no guidance as to the nexus between each asserted interest and the relief granted.*

Beyond the doctrinal difficulties created by allowing private litigants to assert governmental interests, it is far from clear how this Court's recitation of the governmental interests at stake should be understood. After listing several interests which the Florida Supreme Court concluded were protected by the injunction, this Court stated: "We agree that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." 114 S.Ct. at 2526.

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[11] The noise restriction in *Madsen*, which defendants challenged, prohibited making any sounds "within earshot" of the patients inside the clinic. This is a far broader restriction than would be allowed in an ordinary nuisance claim, or, for that matter, in a generally applicable noise ordinance. *See also infra*, Section I(D).

Presumably this does not mean that each of the cited interests must be present to justify injunctive relief similar to that upheld in *Madsen*. If this were so, the decision would effectively single out abortion facilities for special treatment, because that context is, for all practical purposes, the only one in which the "interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy" will be found. 114 S.Ct. at 2526.[12]

Nor could the Court mean that any one of the interests can justify any of the various restrictions upheld. For example, the interest in protecting "medical privacy" alone cannot justify restrictions on speech where both the speaker and the audience are in a public forum. ***But see Williams v. Planned Parenthood Shasta-Diablo, Inc.***, U.S. No. 95-576 (pending), Pet. App. at 16a. But does the allusion to the captive audience doctrine mean that women *inside* the clinics are captive, or are women approaching and leaving the clinic also deemed "captives"? Though some courts, including the Second Circuit in the instant case, have interpreted *Madsen* as designating women approaching clinics to be a "captive audience,"[13] this interpretation would mark a massive expansion of the captive audience doctrine.

Another example of *Madsen*'s ambiguity can be found in the Court's discussion of the provision banning "images observable" to those in-

[12] On the other hand, this interest never appears, in so many words, in the Court's discussion of the contested provisions of the injunction. Was the Court referring to this interest whenever it referred to "protecting access to the clinic"? If so, this means that it was not just access to private property, but access to an abortion clinic which necessitated these restrictions on speech, suggesting that *Madsen* applies primarily in the context of abortion protests. If not, this interest appears to be just a makeweight.

[13] *Pro-Choice Network v. Schenck*, 67 F.3d 377, 392 (2d Cir. 1995) (en banc). *See also*, *Sabelko v. City of Phoenix*, 68 F.3d. 1169, 1172 (9th Cir. 1995), petition for certiorari filed, No. 95-1415 (March 4, 1996) (Pet. App. at 8a). ***But see Pro-Choice Network***, 67 F.3d at 406 n.5 (Meskill, J. dissenting) ("The *Madsen* Court simply recognized that women *in* the clinic were 'held "captive" by medical circumstance,' . . . This however, does not mean that the women ***approaching*** the clinic are captive, and nothing in *Madsen* can be read as so holding") (original emphasis).



side the clinic. In striking down this provision, the Court said, "[I]f the blanket ban on all 'images observable' was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable." 114 S.Ct. at 2529.

This statement seems to mean that the provision violates the First Amendment because it is viewpoint-based. But one could similarly say, referring to the noise provision, that the only plausible reason a patient might be bothered by sounds from the petitioners which were merely audible but not disruptive would be if the patient found the expression contained in such sounds disagreeable. Cf. ***Grayned v. City of Rockford***, 408 U.S. 104, 119 (1972) (upholding noise ordinance prohibiting "only conduct which disrupts or is about to disrupt normal school activities").

The Court continued: "But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment."

Here the Court indicates that the restriction is simply overly burdensome in light of the clinic's ability to block out the speech by pulling the curtains. The Court's discussion leaves open the question of whether even ***viewpoint-based*** restrictions on speech are permissible in the interests of protecting a "captive audience," where no less burdensome method is available.

Unfortunately, although *Madsen* stressed the importance of achieving the correct "fit between the objective of the injunction and the restrictions it imposes on speech," 114 S.Ct. at 2525, the decision fails to identify the nexus between each of the asserted interests[14] and the relief granted.

[14] Indeed, the asserted interest in "ensuring the public safety and order," is not so much an interest as a definition of the basic duty of government. Achieving the proper "fit" between the breadth of this interest and a restriction on speech is a formidable task.

## II. THE LOSS OF FIRST AMENDMENT FREEDOMS SHOULD NOT BE IMPOSED AS PUNISHMENT FOR THEIR EXERCISE.

### A. *The proper response to the violation of an injunction is a contempt proceeding, not another injunction.*

This Court in *Madsen* stated, "Injunctions . . . are remedies imposed for violations (or threatened violations) of a legislative or judicial decree." 114 S.Ct. at 2524. In the particular instance, defendants were found to have violated the trial court's narrower order, which prohibited blocking and trespass. Thus, the imposition of a broader injunction restricting the defendants' free speech rights was held to be necessary to protect access. *Id.* at 2527.

However, the imposition of a broader injunction is certainly not the only, or even the most logical, remedy for violation of an injunction. Assuming *arguendo* that the defendants violated the injunction by interfering with access, the plaintiff's first recourse should have been to seek contempt citations. The narrower injunction cannot be said to have failed to protect access, when there is nothing in the record indicating the plaintiff made any effort to enforce that injunction.

Suppose the defendants violated the noise provision by continuing to make sounds "within earshot" of patients inside the clinic. Could the plaintiffs, rather than seeking to enforce the present injunction through contempt proceedings, instead ask for a further modification of the order to keep the defendants a block away from the clinic, or to forbid them from making any sound at all while in the vicinity of the clinic? The answer from *Madsen*, unfortunately, seems to be yes. The plaintiffs have no obligation to enforce the current order. The remedy for violations of the injunction is a broader injunction.

The absence of such efforts to hold the defendants accountable for allegedly violating the injunction inevitably creates the impression that the imposition of a broader, speech-restrictive injunction is itself the punishment for that offense. As noted *supra*, Section I, the concept of the injunction as remedial relief for the plaintiff was abandoned in fashioning the test for constitutionality. Apparently the plaintiff's



burden of proof has also disappeared. Rather than the plaintiff having to establish that the proposed injunctive restriction is necessary (as in "burdens no more speech than necessary"), the plaintiff need only show a violation of a law or another injunction.[15] At that point, the defendant's free speech rights are forfeit, regardless of what other steps the plaintiff might have taken to protect its interests.

### B. *The protection of "unfettered" access leaves no room for lawful speech activity.*

Due to the lack of a complete record in *Madsen*, this Court based its decision to uphold the 36-foot zone "on the assumption that the evidence and testimony presented to the state court supported its finding that the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress to and egress from the clinic . . ." 114 S.Ct. at 2528.

This finding can be understood in two ways. First, it might be understood to mean that the defendants, because of the particular unlawful manner in which they were demonstrating in front of the clinic, were deliberately interfering with access. The corollary of this finding would be that the defendants had it within their ability to demonstrate and leaflet in front of the clinic *without* interfering with access. Accordingly, their continued refusal to do so provoked the trial court to modify the injunction to keep the defendants across the street.

Unfortunately, imprecise language in *Madsen* allows for a second, constitutionally sinister understanding of this finding, namely, a finding that in and of itself, the presence of demonstrators, regardless of their conduct, interfered with access and warranted broader injunctive relief. For example, the finding refers to the "presence of *protesters*," rather than specifically to the defendants or their agents. This suggests

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[15] The *en banc* court in the instant case denied that a plaintiff need even show that there has been a violation: "nothing in *Madsen* states, or even implies that a TRO must fail before a broader injunction may be imposed; . . ." 67 F.3d at 389. If this is true, then the mere assertion of governmental interests is sufficient to warrant injunctive relief against a defendant.

that the concern here is not with any wrongdoing of the defendants, but with the more general situation arising from the demonstrations.

Moreover, the Court earlier referred to the zone as a means of protecting "unfettered ingress to and egress from the clinic." 114 S.Ct. at 2527. The definition of "unfetter[ed]" is "free[d] from restraint of any kind." Websters' New Twentieth Century Dictionary, 2d Ed. (1966). Thus the Court indicated that injunctive restrictions on speech are appropriate to prevent even a slight impediment to access. Since even a single picketer passing back and forth, or a leafletter waiting to offer a leaflet, may cause cars to slow down, this Court's endorsement of "unfettered" access seems synonymous with holding that *any* demonstration activity in or near driveways threatens access and may be enjoined.[16]

Finally, this Court has held, in the context of statutory restrictions on speech, that '[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, *supra*, 487 U.S. at 485. Under a "somewhat more stringent" standard, the Court upheld an injunction prohibiting the defendants from "congregating, picketing, patrolling, demonstrating or entering" the public sidewalk and street adjacent to the clinic. 114 S.Ct. at 2522, 2527. *A fortiori*, by upholding this "complete ban,"

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[16] In the instant case, the trial court imposed, and the *en banc* court upheld, restrictions on speech at every hospital, doctor's office or other facility in its jurisdiction at which abortions are performed. 799 F. Supp. at 1440. This suggests a reading of *Madsen* that does not require injunctions to be tailored to specific geographic conditions, but instead authorizes categorical injunctive bans on expressive activity. *But see Madsen*, 114 S.Ct. at 2527: "The state court seems to have had few other options to protect access, given the narrow confines around the clinic. . . . The need for a complete buffer zone near the clinic entrances may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute. . . ."

If the one-size-fits-all injunction in the present case is upheld as "burden[ing] no more speech than necessary to serve significant governmental interests," defendants in other cases will be hard put to persuade courts that, in the particular circumstances of their case, these restrictions are overly burdensome.



*Madsen* implies that *any* speech activity in the vicinity of a driveway is "an appropriately targeted evil."

The goal of ensuring that no driver approaching the clinic need take his foot from the gas pedal places an unwarranted burden on free speech rights.

### C. *Injunctive restrictions on speech infringe on the rights of innocent non-parties.*

Injunctive restrictions on speech raise a host of unanswered questions about the effect of the injunction on non-parties, specifically those who are not named but are bound by the injunction as "officers, agents, employees, and servants . . . and all persons acting in concert with" the enjoined parties.

This Court held that "the state court imposed restrictions on defendants incidental to their anti-abortion message because *they repeatedly violated the court's original order*." 114 S.Ct. at 2524 (emphasis added). What, then, is the justification for binding these non-parties, without individualized proof that they too violated the court's order? Do the terms "agent", "employee" and "acting in concert" refer to one's cooperation with the defendant in unlawful activity, or simply participating with the defendant in the speech activity underlying the injunction? Is freedom of speech an individual right, or does it subsist in groups of people "acting in concert," whence it can be taken away from all by showing that any member of the group acted unlawfully?[17]

If one of the petitioners in the instant cases were to ask someone new in town to demonstrate at the clinic, would that person be bound

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[17] Cf. *Healy v. James*, 408 U.S. 169, 185-6 (1972): "[T]he Court has consistently disapproved governmental actions imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. . . . [I]t has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the government,' is an impermissible basis upon which to deny First Amendment rights. . . . The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."

by the injunction? What justification is there for restricting the free speech rights of someone who never interfered with access, and never participated in the petitioners' unlawful activities? Why should either that person or the petitioner be held in contempt if the petitioner encourages the person to demonstrate in a non-obstructive manner on the public sidewalk within the buffer zone?

These questions expose once again the shaky underpinnings of *Madsen*. Where an injunction prohibits unlawful conduct, it is completely logical to bind persons in privity with parties, to prevent the parties from "nullify[ing] a decree by carrying out prohibited acts through aidors and abettors, although they were not parties to the original proceedings." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945).

Where, however, the prohibited acts consist of otherwise constitutionally protected activity, there is no justification for prohibiting the parties from carrying out these acts through others. The petitioners should be free to say to someone, "I lost my right to be on the sidewalk by interfering with access. Will you please go take my place and demonstrate in a lawful manner?"

The fact that the petitioners are not free to encourage someone else to do those constitutionally protected acts that they are prohibited from doing supports the argument raised *supra*, section II(B), that the injunctive restrictions on speech rest, not on any alleged bad conduct of the petitioners, but on a judicial finding that *any* demonstration activity will interfere with "unfettered" access to the clinic, and may therefore be enjoined. The trial court, donning the mantle of the legislature, elevates the governmental interest in ensuring such access above the free speech rights of demonstrators. The resulting injunction is tacitly, or explicitly, understood by all—plaintiffs, defendants, law enforcement, other demonstrators, and the court itself—as a prohibition on speech activity applicable to all pro-life persons.

If *Madsen* continues to be the law of the land, this Court will be called on to decide these questions regarding the binding effect of speech-restrictive injunctions on non-parties. Until that time, however, these injunctions will continue to be used to violate and chill the legitimate exercise of free speech rights across the country.

## CONCLUSION

The Court should take the opportunity presented by the instant case to reconsider its decision in *Madsen v. Women's Health Center*.

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May 16, 1996

(6)

Supreme Court, U.S.
FILED
MAY 15 1996
CLERK

No. 95-1065

IN THE

# Supreme Court Of The United States

October Term, 1995

REVEREND PAUL SCHENCK
and
DWIGHT SAUNDERS,

*Petitioners*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

*Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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May 15, 1996

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9800

18 pp

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

## INTEREST OF AMICUS CURIAE[1]

*Amicus Curiae* is a non-profit civil liberties organization named for Samuel Rutherford, a 17th-century Scottish minister and rector of St. Andrew's University. The Rutherford Institute is comprised of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of

[1] Counsel of record to the parties in the case described above have consented to the filing of the brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

religious liberty, freedom of speech and other constitutional guarantees. Counsel for *Amicus Curiae* have specialized in litigation in state and federal courts and have participated as counsel in previous significant cases before this Court.

The Rutherford Institute believes that the paramount worth of human life and the right to individually or in association with others express unpopular points of view are two of the values most deeply rooted in the law and history of the United States. Diminishing the value of any human life diminishes the lives of all citizens. Prohibiting the peaceful expression of unpopular or controversial points of view further diminishes the freedoms enjoyed by all citizens. The Rutherford Institute believes that the instant case, addressing as it does these fundamental constitutional liberties, is important to constitutional jurisprudence and the growth and progress of the nation.

Affirming the lower court's decision in the instant case would detrimentally impact the exercise of First Amendment freedoms by all citizens. *Amicus Curiae* therefore has a vital interest in seeking reversal of the decision of the lower court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

## STATEMENT OF FACTS

*Amicus Curiae* adopts by reference the statement of facts as set forth in Petitioners' brief filed with this Court.

## SUMMARY OF ARGUMENT

By seeking to prohibit the peaceful exercise of free speech rights under the First Amendment to the United States Constitution, the decision of the lower courts has sounded the warning knell for all those who, now or in the future, wish to express views that may not be majoritarian at a given point in time. Societal mores shift and sway with changing times, but do the Constitutional freedoms for which George Washington and



Thomas Jefferson fought also have to sway in the wind or should those fundamental expressions of human rights be the bedrock upon which we build a just and humane society?

Americans have jealously guarded their right of free association for over 200 years as being vital to the proper maintenance of the checks and balances of government. A core element of that right of association is the right to peacefully assemble in traditional public fora, and the concomitant right to speak in such fora. A legislative blanket ban on the exercise of such fundamental First Amendment rights properly would be struck down by this Court. A judicial blanket ban on the exercise of such First Amendment rights should not be allowed to stand any more than would a legislative ban.

Prior restraint of the freedom of speech of citizens is anathema to our democratic form of government. Precedent demonstrates that it has been anathema to this Court as well. However, the decision of the lower courts in the instant case gives power to a select group of citizens to censor and prohibit the constitutionally protected speech of other citizens, and provides to that select group the full force and support of law enforcement and the judicial system as a threat to the speech of the disfavored citizens.

## ARGUMENT

### I. OUR SOCIETY IS NOT FOUNDED ON THE TOTALITARIAN VIEW OF SOCIETY WHICH REQUIRES ALL SPEECH TO BE IN ACCORDANCE WITH OFFICIAL GOVERNMENT POLICY AND ALL ASSEMBLIES TO BE REPRESENTATIVE OF THAT POLICY.

One of the most important features of our form of government is the freedom of all those within the shadow of the flag to associate with one another and to express values which are divergent from those embraced by others. It is a cornerstone of our

political life that the state may not dictate the thoughts of its citizens, and that neither the state nor any citizen may require another to act, or cease to act, against the dictates of belief or conscience. For this Court to adopt a constitutional model which would require private citizens to conform to transient public values would therefore effect a departure from our historical form of government.

Justice Douglas, in his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), illustrated the dangers of such a course in quoting from Calhoun's *Democracy and Natural Law*, 5 Natural Law Forum 31, 36 (1960):

> One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommittees -- family, school, business, press, church -- completely subject to control by the State. The State then is not one vital institution among others . . . Instead it seeks to be coextensive with family and school, press, business community, and Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the state. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.

*Poe* at 521-22.

> In *Terminiello v. Chicago*, 337 U.S. 1 (1949), this Court said:
>
> [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

*Id.* at 4.



This Court has accorded significant constitutional protection to the freedom of association, as well as to specific groups who have fallen outside the societal norms of the time. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court upheld the right of parents to send their children to private schools and eschewed legislative interference with this right. In two cases before this Court the right of individuals to obtain and use contraceptives was supported *(Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Loving v. Virginia*, 388 U.S. 1 (1967), recognized the right of individuals to marry, and *Boddie v. Connecticut*, 401 U.S. 371 (1971) provided legal support to the right to divorce. *Roe v. Wade*, 410 U.S. 113 (1973), the case which forms the foundation of the controversy which has ultimately led to the case now before the Court, itself represented a departure from the historical norms of Western civilization as a whole and a recognition of the shifting mores of society at that particular time in history.

It was the constitutional freedom to disagree and to express that disagreement that enabled these litigants to demand protection from our judicial system. This is one of our most cherished freedoms, yet it is one which is being denied Paul Schenck and other peaceful, law-abiding citizens who do not agree with the currently favored pro-abortion stance of many, but not all, public authorities. Further, the orders of the lower court in the instant case chill the speech of all those who may seek to peacefully protest abortion in the vicinity of the clinic in the future.

The speculative argument that because some of those opposed to abortion have turned to violence it is acceptable, or even necessary, to remove constitutional rights from all who are opposed to abortion -- an argument which was apparently embraced by the majority of the appellate court in the instant case -- is more than merely short-sighted. It raises the specter of totalitarianism in the minds of more than just pro-life demon-

strators. It is a well-founded rule of law in this free country that speculation as to the possible unlawful acts of persons in the future based on the unlawful acts of other persons in the past may not form the basis for any prosecution or punishment.

The decision of this Court in *Madsen v. Women's Health Center,* ___ U.S. ___, 114 S.Ct. 2516 (1994) made no attempt to put the lie to this principle. In that case this Court upheld an injunction which proscribed certain activities within a fixed area around an abortion clinic, but did *not* uphold a prohibition on all uninvited peaceful approaches to persons seeking access to the abortion clinic. The *Madsen* Court also required there to be something more than peaceful demonstrating and attempts at counselling on the public sidewalk. It required "prior unlawful conduct." *Madsen,* 114 S.Ct. at 2524 n.2. Thus, the *Madsen* decision may not be used to justify unconstitutional attempts to chill the speech of customers in a coffee shop close to the site of demonstrations merely because someone who may seek access to the building which is the focus of the demonstration is also a customer. "Floating" zones were not an issue in *Madsen.* Further, the *Madsen* decision may not be used to justify the constitutionality of permitting third parties to chill speech just because they subscribe to a different viewpoint, as occurs when clinic escorts halt attempts at peaceful counselling on the public sidewalk. Indeed, it may not be used to justify the constitutionality of preferring one viewpoint over another in the public arena.

The blurring of the distinction between unlawful behavior and the lawful expression of deeply held convictions does a disservice, not only to judicial precedent, but to the people of this nation who believe their freedom to speak has always been one vital contributing factor to the development of this free society. Growth and development, indeed, would be impossible without controversial speech. Such speech is not *per se* unlawful, and we send the wrong message to all sides of the abortion debate if we say that it is.



Indeed, this Court frequently has expressed the importance of protecting the speech of those who seek to speak out on matters of public concern. In *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985), this Court, following a line of cases which included *Thornhill v. Alabama,* 310 U.S. 88 (1940) and *First National Bank of Boston v. Bellotti,* 435 U.S. 764 (1978), noted that such speech is at the very heart of the protections afforded citizens by the First Amendment. The Court went on:

> "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982); *Carey v. Brown,* 447 U.S. 455, 467 (1980).

*Dunn & Bradstreet,* 472 U.S. at 758-59 (footnote omitted).

That the speech of Petitioners relates to an issue of public concern is to understate the present nature of the debate. Placing prior restraints on such speech at the behest of one party to the debate is not only a dangerous precedent to set, but a violation of "the precise freedom which the First Amendment sought to protect against abridgement." *Carroll v. President & Comm'rs of Princess Anne,* 393 U.S. 175, 181 (1968).

## II. PRIOR RESTRAINT ON SPEECH CONCERNING ISSUES OF PUBLIC CONCERN IS ANATHEMA TO THE CONCEPT OF DEMOCRATIC GOVERNMENT IN THE UNITED STATES AND VIOLATIVE OF THE VERY FREEDOMS WHICH THE FIRST AMENDMENT WAS ENACTED TO PROTECT.

Our system of law "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975). It is therefore axiomatic that any attempt to regulate speech based upon the communicative impact of expression will subject such content-based regulation to strict scrutiny review by the courts:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . The essence of . . . forbidden censorship is content control.

*Police Department v. Mosley,* 408 U.S. 92, 95-96 (1972). In that case, this Court struck down an ordinance which restricted picketing outside a school on the basis of the content of the demonstrators' speech.

Even commercial speech, which has not frequently been given a position equal to individual free speech on the "hierarchy" of free speech rights under the First Amendment, has recently been held by this Court to be worthy of protection (*See 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. v. Rhode Island and Rhode Island Liquor Stores Association*, 1996 U.S. LEXIS 3020, where this Court held that a blanket ban on liquor price advertising could not be upheld unless the speech itself was flawed, either because it was deceptive or it was related in some way to unlawful activity). If commercial speech



falls under the umbrella of First Amendment protection, how much more must our precious individual freedom of speech be protected where it is a lawful expression of legitimate concern over an issue of public controversy.

Only where speech falls within the parameters of obscenity, defamation, incitement to imminent lawlessness, or fighting words may it fall outside the protection of the First Amendment. Even there, this Court has recognized that such speech cannot be discriminated against on the basis of content where such discrimination is not reasonably *necessary* to achieve government interests. (See *R.A.V. v. City of St. Paul,* ___ U.S. ___, 112 S.Ct. 2538 (1992), where this Court held that a bias-motivated crime ordinance was content-based becuase it prevented too specific a category of expression.)

The *Madsen* decision, by its own definition, does not affect the test for content-based exclusion of communicative activity as enunciated in *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983). Where there is such an exclusion the State is required to show that such regulation is necessary to serve a compelling State interest and that it is narrowly tailored to achieve that end.

As this Court has stated:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order.

*Carroll*, 393 U.S. at 183. The injunction before this Court cannot be described as "narrowly tailored" by any definition of that term.

While the courts have traditionally balanced the right to communicate with the right of others not to be assaulted in that communication, they have consistently held that controversial

speech is protected under the Constitution, and that the right to communicate is meaningless without the ability to convey that communication. As this Court stated in *Terminiello,*" [s]peech is often provocative and challenging . . . [but it] is nevertheless protected against censorship or punishment." 337 U.S. at 4. In *Boos v. Barry,* 485 U.S. 312 (1988), an ordinance prohibiting the communication of messages denigrating a foreign government within a certain distance of that country's embassy was held to be an unconstitutional content-based regulation of speech. The Court held that, "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech" in order to protect the freedoms afforded by the First Amendment. 485 U.S. at 322.

Thus, content-based regulations should rarely pass strict scrutiny. *Burson v. Freeman,* 504 U.S. 191 (1992). The right of *access without interruption* to abortion clinics, as against the right to *have* an abortion (which is a completely separate issue not on appeal here), should certainly not be included in that category. This is especially true when this Court noted in *Bray v. Alexandria Women's Health Clinic,* ___ U.S. ___, 113 S.Ct. 753 (1993), that the right to abortion itself "is much less explicitly protected by the Constitution" than the right of free speech. 113 S.Ct. at 764. While the right to speech is not an absolute right, neither is the right to an abortion. Thus, a court which places the right of access to a business which carries out abortions, free from any approach from peaceful picketers, above the constitutionally protected right to free speech, is unilaterally creating a new and fundamental constitutional right which trumps those already held to be on the highest rung of protected rights. Such a court therefore usurps this Court's position as the ultimate arbiter of rights under the Constitution.

The argument that other means of communication are open to Petitioners and other pro-life supporters does not overcome the presumption of unconstitutionality where a no-speech zone



has effectively been created. The communication would not have the same impact were it to be removed to a meeting hall or a town park elsewhere, since those to whom the communication is directed would not be able to receive the information being offered. (*See Hudgens v. NLRB,* 501 F.2d 161 (5th Cir. 1974), where picketing outside a mall within which a subject store was located was held to be not sufficient and where picketing at the store entrance inside the mall was upheld.)

In *The Morality of Consent,* A. Bickel stated eloquently the harm that is done to First Amendment protections when effective communication is stifled:

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss -- a loss in the immediacy, the impact, of speech . . . Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

*The Morality of Consent* 61 (1975).

In *Thornhill v. Alabama,* 310 U.S. 88 (1940), a case involving a complete ban on picketing near businesses, this Court held that neither the danger of economic injury nor the mere possibility of violence initiated by labor picketing, were sufficient threats to permit an abridgement of the demonstrators' constitutionally protected right to free speech. 310 U.S. at 105. The Court noted that permitting such a complete abridgement of free speech based solely upon the public concerns arising out of labor disputes would legitimize restrictions on free speech in nearly every instance involving matters of social importance. Over 50 years later apparently it is still necessary to reiterate that the Constitution does not permit sweeping bans on the communication of certain viewpoints.

Certainly there is no constitutional right accorded third parties to interrupt communication, as is the case with the

injunction in the instant case, which requires Petitioners to cease communicating at the instigation of *anyone* present when an attempt is made to peacefully communicate Petitioners' message on the public sidewalk. The constitutional rights of Petitioners may not be denied, "simply because of hostility to their assertion or exercise." *Cox v. Louisiana,* 379 U.S. 536, 555 (1965). (*See also Claiborne Hardware,* 458 U.S. at 910, where the Court held that "speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.")

Injunctions are classic examples of prior restraint on speech, and should be viewed with great suspicion where they enjoin peaceful speech in traditional public fora and where there has been no attempt to engage in conduct outside the law. In the instant case, parties to the suit stipulated, for the purposes of the case, that blockades and mass trespass could be enjoined. Thus, there can be no question that what is being enjoined by the injunction before this Court is peaceful, lawful activity on the part of persons who represent one point of view on a controversial issue.

Restrictions which are sweeping attempts to gag all speech with a particular viewpoint are especially repugnant. As Justice Scalia noted in his dissent in *Madsen:*

> The vice of content-based legislation -- what renders it *deserving* of the high standard of strict scrutiny -- is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes. And, because of the unavoidable 'targeting' . . . precisely the same is true of the speech-restricting injunction.

*Madsen,* 114 S.Ct. at 2539.

A floating zone which prospectively enjoins the expression of one viewpoint only by any and all who hold that viewpoint



is a threat to the constitutional rights of everyone who may find themselves on the "wrong" end of a controversy at a given point in time. As this Court stated in *Nebraska Press Ass'n. v. Stuart,* 427 U.S. 539 (1976), prior restraints are to be considered "the most serious and the least tolerable infringement on First Amendment rights." 427 U.S. at 559. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

The gagging of demonstrators at the discretion of those opposed to their point of view is such an intolerable infringement on the constitutional rights of all citizens of the United States, and we ask that this Court enunciate clearly in its ruling that such a derogation of constitutional rights will not be given judicial approval.

## CONCLUSION

There is no doubt that feelings on both sides of the abortion debate run high. There is equally no doubt that there are those involved in the debate who wish to suppress the speech of those with contrary opinions. Law is an imperfect tool of man, and bears relation to virtue only in the eyes of those who approve of any particular enactment or decision. However, it is one of the few tools available to a civilized society to ensure respect for all men. We cannot allow it to be perverted into a weapon in the hands of any particular interest group. Thomas Aquinas wrote:

> [H]uman law is laid down for the multitude the major part of which is composed of men not perfected by virtue. Consequently, all and every vice, from which virtuous men abstain, is not prohibited by human law but only the gravest vicious actions, from which it is possible for the major part of the multitude to abstain, and mainly those -- like homicide, theft, etc. -- which

> are harmful to others, and without the prohibition of which human society could not be preserved.

Jacques Maritain, *Man and the State*, 168 n.24 (1951) (quoting Thomas Aquinas).

We live in an age of increasing intolerance toward anyone with a different point of view. Rejection of such intolerance was one of the major reasons for the founding of this nation.

Whether we are pro-life or pro-choice, open and peaceful communication of that belief is protected by the Constitution. The affirming of an injunction which attempts to ban expression of any viewpoint from the public arena by imposing a "floating" zone of impermeability to such expression would threaten the very underpinnings of this nation. It would be the death knell to free and open debate on any controversial subject where one side denies the right of the other to hold or express their beliefs.

Protection of the fundamental freedoms of the people of the United States requires that the majority decision of the court below be reversed.

Respectfully submitted,

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May 15, 1996

MOTION FILED

MAY 1 4 1996

No. 95-1065

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

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PAUL SCHENCK

PETITIONER

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK

RESPONDENT

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem.

This is effectively a motion to allow retained counsel since there will be no expense to the Court or to taxpayers.

INTEREST OF COUNSEL

Alan Ernest is a member of the Court's bar and his defense of the right to life of the unborn is well-known to the Court.

SUMMARY OF ARGUMENT

The unborn have a legal right to be represented by counsel, and to be aided by all the procedures guaranteed by the Constitution, so their counsel can prove that the Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn.

Argument

I.

THE COURT USED THE MOCK TRIALS TO EFFECT AND MAINTAIN ITS ROE v. WADE KILLINGS WHICH THE NUREMBERG TRIBUNAL CONDEMNED AS "NOT A JUDICIAL PROCEEDING BUT A MURDER"

THE UNBORN HAVE A LEGAL RIGHT TO BE REPRESENTED BY COUNSEL, AND AIDED BY ALL PROCEDURES GUARANTEED BY THE CONSTITUTION, TO DEFEND THEIR CONSTITUTIONAL RIGHT TO LIFE

1.

THIS COURT EFFECTED AND MAINTAINS ITS ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR CONSTITUTIONAL RIGHT TO LIFE

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in the U.S. Supreme Court:

> "(T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth." Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

But the Court refused to allow counsel to represent the unborn and defend their right to life under the U. S. Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow counsel to represent the unborn, and defend their right to life under the Constitution.[1]

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1. Colautti v. Franklin, 439 U.S. 379, motion to allow counsel for the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel for the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel for the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel for the unborn denied 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel for the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel for the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel for the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel for the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476 motion to allow counsel for the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel for the unborn denied 458 U.S. 1104; Diamond v. Charles, 476 U.S. 54, motion to allow counsel for the unborn denied 473 U.S. 932; Thornburgh v. American College of Obstetricians, 476 U.S. 747, motion to allow counsel for the unborn denied 473 U.S. 931; Hartigan v. Zbaraz, 484 U.S. 171, motion to allow counsel for the unborn denied 479 US 1003; Webster v. Reproductive Health Services 492 U.S. 490, motion to allow counsel for the unborn denied 489 U.S. 106; Ohio v. Akron Center for Reproductive Health, 497 US 502, motion to allow counsel for the unborn denied 493 U.S. 802; Hodgson v. Minnesota, 497 US 417, motion to allow counsel for the unborn denied 492 U.S. 803; New York v. Sullivan, 500 U.S. 173, motion to allow counsel for the unborn denied 497 U.S. 1002; Planned Parenthood of Southeastern Pennsylvania v. Casey, 120 L Ed 2d 674, motion to allow counsel for the unborn denied 117 L Ed 2d 614; National Organization for Women v. Scheidler, 126 L Ed 2d 99, motion to allow counsel for the unborn denied 125 L Ed 2d 786 (1993).



The unborn have a constitutional right to be represented by counsel to defend their right to life under the U.S. Constitution.[2]

2. Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970). See also, In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S.Constitution

Judges who willfully deny this right are guilty of crime.[3] This denial makes Roe v. Wade void.

2.

THE COURT EFFECTED ITS ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ANY PRIOR NOTICE OF THE STANDARDS, THE BURDENS OF PROOF, OR THE EVIDENCE WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION

The U.S. District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the Constitution. This question was argued for the first time after the case reached the U.S. Supreme

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so that she could be killed with impunity from criminal laws? This is preposterous.

The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can it permit any court to condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing the lives of all Jews are not protected by the U.S. Constitution, and it is "liberty" to kill all Jews with impunity from criminal laws.

Any victim is entitled to all these procedural protections before any court can decree that the victim's life is not protected by the Constitution, and the victim can be killed with impunity from criminal statutes. The rule for one is the rule for all. These are the sacred truth-seeking procedures which protect the lives of all Americans from extermination.

3. "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976).



Court. Since the Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion.

In the aftermath of Dred Scott and the civil war, the Fourteenth Amendment was intended to assure the nation that the Court could never again imply another exception to the Constitution's universal guarantee of life and liberty to "any person."[4]

But in 1973, the Court combined total surprise with defiance of longstanding legitimate public expectation, and implied another exception to "any person."

In particular, the Court gave the parties in Roe v. Wade no prior notice of the constitutional standards, the burdens of proof, or the evidence, which the Court used to infer that the Fourteenth Amendment's guarantee of life to "any person" did not include the unborn.

The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be

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4. The history of Dred Scott is outlined in the amicus brief filed herein by the Legal Defense for the Unborn p. 4-6.

> subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones. (emphasis added)
> Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

But the Court refused to allow the original parties to have any prior notice. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal bases needed to defend the unborn's right to life under the U.S. Constitution.[5]

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the Constitution so they can be killed with impunity from criminal statutes.[6] Judges who willfully deny this right are guilty of crime.[7] This denial makes Roe v. Wade void.

3.

THE COURT EFFECTED ITS ROE v. WADE KILLINGS BY USING UNCONSTITUTIONAL SECRET PROCEEDINGS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION

The Court used secret evidentiary proceedings to find evidence to infer that the lives of the unborn were not protected by the Constitution. The Court conducted these evidentiary proceedings in its back rooms.

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5. See cases in note 1, supra.

6. See note 2, supra.

7. See note 3, supra.



The parties were not allowed to be present. No public record was made of the secret proceedings. The purpose of these secret proceedings was to give the Justices an opportunity to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected to these secret proceedings:

> "The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth." Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

The first time the victims saw the evidence used against them was after they were already condemned to death. But the Court overruled the party's objection to its secret evidentiary proceedings. Thus the Court commenced its killings.

And the Court has maintained its killings despite repeated objections that it used secret proceedings in Roe v. Wade.[8]

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary proceedings.[9] Judges who willfully deny

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8. See cases in note 1, supra.

9. See note 2, supra.

this right are guilty of crime.[10] This denial makes Roe v. Wade void.

4.

THE COURT EFFECTED AND MAINTAINS ITS ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED

Since the Court used secret evidentiary proceedings, the original parties had not seen all the evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the U.S. Constitution:

> "The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion ... of constitutional stages of fetal growth." Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

But the Court refused to allow its evidence in Roe v. Wade, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be cross-examined. Thus the Court commenced its killings.

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10. See note 3, supra.



And despite repeated claims that the Court fabricated evidence, the Court has maintained its killings by steadfastly refusing to allow its evidence, which it used to infer that the lives of the unborn were not protected by the U.S. Constitution, to be confronted and cross-examined.[11]

The unborn have a constitutional right to confront and cross-examine the evidence which the Court used to infer that their lives are not protected by the U.S. Constitution.[12] Judges who willfully deny this right are guilty of crime.[13] This denial makes Roe v. Wade void.

5.

THE COURT EFFECTED AND MAINTAINS ITS ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO PROVE THAT THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution, which the parties did not see until after Roe v. Wade was decided. The parties never had opportunity to present evidence under these new standards. An original party requested permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution:

> "We are dealing here with a procedure long considered outlawed and which has suddenly become legal."
> ....

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11. See cases in note 1, supra.

12. See note 2, supra.

13. See note 3, supra.

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"The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed."

....

"Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute."

....

"With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action."

....

"In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence."

....

"At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life." Petition for Rehearing 3 - 6, 8



Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

But the Court refused to allow the party to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the Court commenced its killings.

And the Court has maintained its killings by steadfastly refusing to allow evidence to be presented on behalf of the unborn to prove that their lives are protected by the U.S. Constitution.[14]

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[15] Judges who willfully deny this right are guilty of crime.[16] This denial makes Roe v. Wade void.

## CONCLUSION

The Nuremberg Tribunal cited these judicial procedures as part of its evidence to convict Nazi judges of complicity in extermination and murder:

> "In many instances they [the accused] were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them." United States v. Altstoetter,

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14. See cases in note 1, supra.

15. See note 2, supra.

16. See note 3, supra.

3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-47.

The Nuremberg Tribunal said, "Such a mock trial is not a judicial proceeding but a murder."[17]

The Court used mock trials to effect and maintain its Roe v. Wade killings, which were not judicial proceedings but murders.

And the Court claims it can use such mock trials to decree the extermination of Jews, or anyone else, to be liberty.[18]

## II.
## COUNSEL FOR THE UNBORN RAISES ISSUES, NOT RAISED BY THE PARTIES, WHICH DISPOSE OF THIS CASE

### 1.
### THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN

Counsel will prove that the Constitution's universal guarantee of life to "any person" does include the unborn.[19]

### 2.
### LEADERS OF THE U.S. GOVERNMENT CONSPIRE TO MAINTAIN THE ROE v. WADE KILLINGS BY IMPOSING THE NAZI DOCTRINES ON THE UNITED STATES WHICH THE UNITED STATES ITSELF CONDEMNED AS MURDER AND EXTERMINATION AT NUREMBERG

By merely changing the names of the victims being killed, the U.S. Supreme Court

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17. United States v. Altstoetter, supra, at 1164.

18. See Part II, infra pages 12-22.

19. See the amicus curiae brief by the Legal Defense For Unborn Children, filed herein, and incorporated by reference.



has duplicated the crimes of "the supreme judge" of Nazi Germany.

At Nuremberg, the Nazi judges claimed they could not be found guilty of complicity in extermination and murder of millions of Jews and other minorities because "the supreme judge" of Nazi Germany had decreed those killings to be legal, and they were required to obey the decrees of "the supreme judge."[20]

Yet the United States prosecuted the Nazi judges for complicity in extermination and murder. And the Nuremberg Tribunal convicted them with the comment: "The dagger of the assassin was concealed beneath the robe of the jurist."

The record proves that the U.S. Supreme Court conspires to impose those same Nazi doctrines on America. The Court decreed killings to be "liberty" which the people had defined by their homicide statutes to be "murder."[21] The Court decreed mass murder to be legal, just as "the supreme judge" of Nazi Germany decreed mass murder to be legal. By merely changing the names of the victims, the Court has duplicated the decree of "the supreme judge" of Nazi Germany.

### 2.

When the U.S. Supreme Court was accused of mass murder in U.S. District Courts, the U.S. Government defended it by claiming its Supreme Court could decree the mass murder of anyone to be legal. The U.S. Government argued in open court that its Supreme Court must be obeyed even if it decreed the mass murder of Jews to be liberty. An incredulous U.S. District Judge asked the Government:

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20. United States v. Altstoetter [The Justice Case], supra, at 983-985, 1011-1014.

21. See the amicus brief filed herein by Legal Defense for Unborn Children p. 6-14.

[U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in Roe v. Wade took a discrete group of entities and said that these entities have no right to live, and thus may be killed .... And he said if you take Roe v. Wade and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.

Would you argue stare decisis to me if, under Roe v. Wade, at the whim of neighbors Jews could be put to death?

[U.S. Government Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[22]

Thus the U.S. Government defended its Justices accused of mass murder by claiming the same doctrines which the United States itself prosecuted as complicity in murder and extermination at Nuremberg.

It was undisputed that the U.S. Supreme Court decreed killings to be "liberty" which legislatures had defined to be "murder." It was undisputed that the victims were being killed in defiance of murder statutes. Yet the U.S. Government expressly claimed in open court that its Supreme Court must be obeyed even if it decreed the mass murder of Jews, or anyone else, to be liberty.

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22. Ernest v. United States Attorney for the Eastern District of Virginia and U.S. Attorney General, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22, cert. denied 475 U.S. 1084 (1986).



Although the U.S. District Judge objected that Roe v. Wade was "the worst decision by the Supreme Court in the history of the Court," he adopted the U.S. Government's arguments that he must obey the U.S. Supreme Court no matter whom it decreed a liberty to kill.[23]

3.

The petition for review of that decision filed in the U.S. Supreme Court accused it of mass murder:

> For the 67th time, the U.S. Supreme Court is accused in its own Court with mass murder in violation of state and federal statutes.[24]

The U.S. Government waived its right to oppose the petition for review, and thus the U.S. Supreme Court was accused in its own Court of mass murder, and the accusations were unopposed. Yet the Court neither denied that it had decreed mass murder to be liberty, nor objected to the trial court ruling that it must obey the U.S. Supreme Court even if it decreed the mass murder of Jews, or anyone else, to be liberty. If any Justice had believed that the U.S. Supreme Court did not have the power to decree the mass murder of Jews, or anyone else, to be liberty, the Justice would certainly have noted his or her objection. But no such objection was noted.

This record proves a conspiracy by the executive and judicial departments of the government of the United States to impose the Nazi doctrines on the United States

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23. Petition for Cert. at A1, Ernest v. United States Attorney for the Eastern District of Virginia et al, cert. denied without comment, 475 U.S. 1084 (1986).

24. Id., at page 50.

which the United States itself condemned as complicity in extermination and murder at Nuremberg. Only the names of the victims being killed have been changed.

4.

Moreover, each Justice of the U.S. Supreme Court was named as a defendant in a civil suit, and accused in a State court of mass murder and treason.[25] The State court was asked to "Declare that there was probable cause to believe that the U. S. Supreme Court had conspired to commit murder" in violation of the State murder law.[26] Such a ruling could have been tantamount to the start of the criminal prosecution process against the Justices for mass murder.

History had never seen a moment when it was more imperative to meet charges, and if possible, refute them. The charges were made in court, the place designated by law to hear such charges. The courthouse is the place where anyone, including the most powerful, can be summoned, confronted with the facts, and required to adequately explain, or face the consequences.

But the Justices did not deny that they had decreed killings to be "liberty" which that State had defined to be "murder." Nor did the Justices deny that under Roe v. Wade victims were being killed in defiance of the State's murder statute. Nor did the Justices deny that they had been repeatedly accused of mass murder and extermination in the U.S. Supreme Court, but they had never attempted to refute the charges. Nor did the Justices

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25. Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General, et al, filed in the Circuit Court of Fairfax, Virginia, Civil No. 90367.

26. Complaint, supra note 25, at page 44.



deny that they were seeking to impose the Nazi doctrines on the United States which the United States itself condemned as extermination and murder at Nuremberg. To the contrary, this would be their defense.

The U.S. Government removed the case to the U.S. District Court in Alexandria.[27] Even though accused of extermination, mass murder and treason, the Justices did not attempt to show one single allegation in the complaint to be wrong in fact or law. The record shows the charges to be true.

Rather each Justice, through his or her U.S. Government lawyer, claimed that even if the U.S. Supreme Court decreed the mass murder of anyone to be liberty, all lower courts must obey.[28] And the Justices also claimed that after the Supreme Court had decreed the mass murder of anyone to be liberty, the victims being killed could not challenge the validity of its decree in any

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27. Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General, in the U.S. District Court in Alexandria, Civil No. 89-732-A.

28. The Justices claimed that the District Court "is prohibited by stare decisis from granting the relief requested in this action." Although a trial court was asked to find probable cause that the Justices had conspired to commit mass murder, the Justices defended themselves by claiming "a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Ernest v. Rehnquist, etc., supra note 27, Government's Memorandum in Support of Motion to Dismiss, page 3.

court.[29] The U.S. District Judge adopted the Justices' claims as law by summary decree - refusing to hold any hearings, and without showing any of the allegations in the complaint to be wrong in fact or law.

Thus, in defending themselves against accusations of mass murder and treason, each Justice of the U.S. Supreme Court claimed the power to decree the mass murder of Jews, or anyone else, to be liberty. And this claim is now accepted by the government of the United States - its courts, Congress and President - as the supreme law of the land.

Moreover this has been the steadfast policy of the U.S. Government, asserted in court after court, for almost two decades.[30] All the lower judges, who have upheld this Court's claim of power to condemn millions to death by decree, are accused herein of complicity in extermination, mass murder and treason to the U.S. Constitution.[31]

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29. Id., Government's Memorandum in Support of Motion to Dismiss, at page 4.

30. Some of these cases are: U.S. District Court in Alexandria, Civ. No. 89-732; U.S. District Court in Salt Lake City, Civ. No. 85-0026; U.S. District Court in Richmond, Civ. No. 84-0858; U.S. District Court in Portland, Civ. No. 81-0272.

31. U.S. DISTRICT JUDGES: Albert V. Bryan, Jr.; Emmett R. Cox; Edward T. Gignoux; Harold H. Greene; J. Thomas Greene; William B. Hand; Joseph C. Howard; Martin F. Loughlin; Robert Earl Maxwell; Louis F. Oberdorfer; Raymond J. Pettine; Aubrey E. Robinson, Jr.; John J. Sirica; James R. Spencer; James C. Turk; D. Dortch Warriner; Don J. Young. U.S. CIRCUIT JUDGES: D.C. Circuit; David L. Bazelon; Carl McGowan; Roger Robb; George E. MacKinnon; Spotswood Robinson III; J. Skelly Wright; Edward A. Tamm; Malcolm R. Wilkey; First Circuit - Levin H. Campbell; Frank M. Coffin; Hugh H. Bownes; Stephen G. Breyer; Fourth Circuit - Harrison L. Winter; Donald S. Russell; H. Emory Widener, Jr.; Kenneth K. Hall; James D. Phillips, Jr.; Francis D. Murnaghan, Jr.; James M. Sprouse; Sam J. Ervin, II; Robert F. Chapman; Eleventh Circuit - John C. Godbold; Paul H. Roney; Gerald B. Tjoflat; James C. Hill; Peter T. Fay; Robert S. Vance; Phyllis A. Kravitch; Frank M. Johnson, Jr.; Albert J. Henderson, Jr.; Joseph W. Hatchett; R. Lanier Anderson, III; Thomas A. Clark. AND the judges in Roe v. Wade and Doe v. Bolton who decreed a "liberty" to kill the unborn without any investigation to see if their lives were protected by the U.S. Constitution: Circuit Judges Morgan and Goldberg; District Judges Smith, Henderson, Hughes and Taylor.



5.

President Bill Clinton has repeatedly rejected pleas to withdraw the U.S. Government's claim, made in numerous courts, that its Supreme Court has the power to decree the mass murder of Jews or anyone else to be legal. President Clinton was informed:

> The general rule is that mistake of law is no excuse for breaking the law. The narrow exception of reasonable reliance on an official judicial opinion, thereafter found to be a mistake of law, does not even apply in homicide cases. So if the U.S. Government's claim (that its Supreme Court has the power to decree the mass murder of Jews or anyone to be liberty and such decrees must be obeyed as the supreme law of the land) ultimately turns out to be a mistake of law, then all the government officials responsible for this lawless claim, which they used to perpetuate mass killing of children in open defiance of murder statutes, will be

guilty of complicity in a national scheme of mass murder.

....

If the U.S. Government's claim ... turns out to be a mistake of law, and you refuse to repudiate it while victims are actually being killed in defiance of murder statutes, then your acquiescence can implicate you in a national scheme of mass murder. This letter becomes a part of the record of this case as evidence of what you knew, and when you knew it.[32]

Yet while the victims were being killed in defiance of murder statutes, President Clinton not only rejected thirty-four such requests to withdraw the U.S. Government's claim, he also publicly endorsed the Roe v. Wade killings on numerous occasions, and his lawyers argued in this Court for greater protection for abortions.

Thus this President has contributed to this giant conspiracy to kill victims in defiance of murder statutes, and to impose on the United States the doctrines which the United States itself condemned as extermination and murder at Nuremberg. A jury could find this amounts to complicity in extermination, mass murder and treason.

6.

Leaders of Congress have also aided this conspiracy.[33] By acts of commission or

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32. Letter to President Clinton dated March 31, 1993, certified no. P 867-382-498, received by the White House April 9, 1993.

33. The complaint, supra note 27, at p. 3, alleged that various members of the committees on the Judiciary, whose particular duty was to control the courts, were a part of the conspiracy: "The co-conspirators include ex-Chairman Peter Rodino, Chairman Rep. Jack Brooks, sub-



omission, leaders of Congress have helped the federal judicial and executive departments in this gigantic conspiracy to impose the Nazi doctrines on the United States which the United States itself condemned as extermination and murder at Nuremberg.[34] A jury could find this amounts to complicity in extermination, mass murder and treason.

7.

A U.S. courthouse has become a place where U.S. officials conspire to exterminate and murder, to overthrow the U.S. Constitution, and to escape the law by imposing Nazi doctrines on America. This is a signal event in the history of mankind's search for a government of laws, and not of men.

8.

This is a conspiracy by leaders of the judicial, executive and legislative branches of the government of the United States:

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committee chairman Rep. Don Edwards, sub-committee chairman Rep. Robert Kastenmeier; Chairman Sen. Joseph Bidden, ex-Chairman Sen. Edward Kennedy. A jury could find this conspiracy to be murder." A jury might also convict numerous other current and former leaders of the U.S. Congress.

34. When the U.S. Congress held hearings on Roe v. Wade, it conspired to allow all the false evidence in Roe v. Wade to be presented, but refused to allow the rebuttal to be presented, and thus Congress conspired to present falsehood to the nation as if it were the truth. Moreover leaders of Congress have deliberately defied their constitutional duty to control this Court, knowing full well that their defiance would directly contribute to the death of the victims in violation of murder statutes. And many leaders of Congress have publicly endorsed the Roe v. Wade killings.

(1) to claim the power to decree the mass murder of Jews, or anyone, to be legal;
(2) to actually kill victims in violation of murder statutes; and
(3) to supplant the U.S. Constitution as the supreme law of the land, and to impose the Nazi doctrines on the United States which the United States itself condemned as extermination and murder.

The human mind cannot imagine a plainer or bolder case of treason to the U.S. Constitution by officials whose prime duty, and sworn duty, is to uphold it.

CONCLUSION

The Court is moved to allow Alan Ernest to represent the unborn and defend their right to life under the U.S. Constitution, and to prove that the Constitution's guarantee of life to "any person," in the Fifth and Fourteenth Amendments, does include the unborn. Both State and Federal governments have a duty to protect unborn life.

_____

Alan Ernest
Counsel

Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

No. 95-1065

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
*Petitioners,*
v.
PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

---

### INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* for the American Federation of Labor and Congress of Industrial Organizations, a federation of 75 national and international unions representing approximately 13,000,000 working men and women, is filed with the consent of the parties as provided for in the Rules of this Court.

Historically, the AFL-CIO, and its affiliated unions, have had a vital interest in the First Amendment rights of citizens to disseminate their views on the public streets by picketing, handbilling and other communicative means. Indeed, many of the leading cases that this Court has decided in the First Amendment area have involved the efforts of union members to engage in such expressive activities.[1] That being so, the AFL-CIO has filed briefs as an *amicus curiae* in a substantial number of this Court's recent cases involving the exercise of First Amendment rights on the streets.[2]

The AFL-CIO and its affiliated unions have also, over the years, had a vital interest in the scope of the courts' power to enjoin expressive activities in the public demonstration context. The labor movement knows at first hand

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[1] *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1964); *DeBartolo v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988).

[2] *See, e.g., International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

that this power can be used overbroadly. *See* Frankfurter & Greene, *The Labor Injunction* (1930). Indeed, recognition of that danger led Congress to pass the Norris-LaGuradia Act, 29 U.S.C. § 101, *et seq.*, which protects against such abuses in federal court proceedings.

Because of its interest both in the substantive First Amendment protection for communication on the public streets and in the scope and nature of speech-limiting injunctions, the AFL-CIO filed a Brief Amicus Curiae in Support of Neither Party in *Madsen v. Women's Health Center*, —— U.S. ——, 114 S. Ct. 2527 (1994), and is filing a Brief Amicus Curiae in Support of Neither Party in this case as well.

## SUMMARY OF ARGUMENT

I. In *Madsen v. Women's Health Center*, —— U.S. ——, 114 S. Ct. 2516, 2529 (1994), this Court held that to be constitutional speech-limiting injunctions must "burden no more speech than necessary to serve a significant government interest." Applying this constitutional standard, the *Madsen* Court held that where there was a history of access-blocking demonstrations outside a clinic where abortions were performed, an injunction could limit "focused picketing" demonstrations near the entrance to the clinic to an area thirty-six feet from clinic property and ten to twelve feet from the cars entering the clinic's parking lot.

The injunction issued in this case in an attempt to prevent interference with abortion clinic access that is both broader and narrower than the one in *Madsen*. Evaluating its constitutional validity is complicated by several factors, among them that the primary legal basis for the injunction was reversed by the district court some time after the injunction issued; the injunction is a generic one applicable throughout the Western District of New York, not adapted as was the *Madsen* injunction to the configuration of the particular clinic; and the courts below did not



explain why the injunction as issued forbids all forms of communication including leafletting and similar orderly, expressive conduct within its "buffer zone" when the articulated concern is with "in your face" tactics that involve crowding, yelling at, and the following of, individuals entering and leaving the clinic. The explanations for these lapses are that the district court issued its injunction before *Madsen* was decided and applied a looser "time, place and manner," standard and that in reviewing that injunction a majority of the *en banc* Second Circuit, joining an opinion by Judge Winter, proceeded on the basis that *all* at-the-site communicative appeals asking those planning to use a site facility to forego, on a principled basis, their intended course of action is speech entitled to only the most limited First Amendment protection.

II. There is no doubt that an underlying concern of the Winter majority—controlling the abusive confrontations practiced by the defendants in this case as "sidewalk counselling"—*could* be constitutionally accomplished by a carefully drafted injunction. But the broader proposition embraced by that opinion—that the First Amendment does not protect or protects only to a very limited extent *all* at-the-site persuasive activity—has been rejected by this Court in the past and should be rejected again.

This Court held long ago, and has repeated many times since, that the public streets are an area in which governmental authority to restrict speech is at its nadir. Communication on the streets is protected when it persuades to action as well as when it simply provides information or abstract thoughts. And, persuasive speech at the site at which a responsive action is requested, rather than on a remote unconnected street corner, is constitutionally protected as well.

First, the general First Amendment commitment to speaker autonomy includes the speaker's right to select

her own audience, rather than to address a governmentally-defined audience that is much broader than the group of people likely to be interested in the communication or to respond to its persuasive appeal.

Second, the First Amendment protects speech that appeals to emotion as well as to reason, including emotions such as shame and social ostracism, and does not police the response time available to addressees where the requested response is a lawful one.

Third, the First Amendment applies where the addressee is on the street in order to reach some specific location for an important purpose as well as where the addressee is furthering an aimless or idle pursuit. Such individuals are not a "captive audience" in the very limited sense used in this Court's cases—they are neither necessarily exposed for a prolonged period to a communication nor are they entitled to the protection from all unwanted speech accorded in the unique situation of one's own home. Indeed, recognition of a right to be free on public streets from appeals to community responsibility over private preference, would be to take sides on the merits of the moral issue the speaker raises an anathema under the First Amendment and in the free society that Amendment safeguards.



## ARGUMENT

### I

This case is closely related factually to *Madsen v. Women's Health Center*, —— U.S. ——, 114 S. Ct. 2516 (1994) and the injunction here raises constitutional issues equally closely related.

(A) *Madsen* sets out the standard for determining the validity of injunctive "buffer zone" restrictions on speech activity in the form of a demonstration. *Madsen* is thus in the line of this Court's cases setting the constitutional parameters on the courts' authority to meet *illegal action* —such as obstruction of access to buildings, vandalism or assault—by those engaged in otherwise constitutionally protected speech activity on the public streets, through injunctions that ban *both* the illegal action *and* the defendant's speech activity.[3]

Injunctions against a defendant's speech activity predicated on the trial court's judgment as to what is necessary to provide complete relief to a plaintiff with good legal claims against the defendant, as *Madsen* recognizes, not only run against the First Amendment's grain but do so through a process that carries a greater potential for point-of-view based/content-based discrimination than an across-the-board legislative limitation on a defined class of speech activity on the public streets.[4] That being so,

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[3] The generic problem addressed in these cases long antedates the recent abortion controversy. The labor movement, the civil rights movement, and the student and antiwar movements have all pressed strongly-held viewpoints through a combination of fully-protected speech activity and street actions that obstruct, illegally intrude on, or even physically endanger others. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1940); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *cf. Cox v. Louisiana*, 379 U.S. 536 (1965).

[4] While the reasons spelled out in the *Madsen* opinion provide a more than sufficient base for the Court's holding, they are not

the *Madsen* Court concluded that to pass constitutional muster speech-limiting injunctions must "burden no more speech than necessary to serve a significant government interest," or, in an alternative synonymous formulation, must be " 'couched in the *narrowest terms that will accomplish the pin-pointed objective*' of the injunction." 114 S. Ct. at 2525, 2526 (*quoting Carroll v. President and Comm'rs of Princess Anne, supra*, 393 U.S. at 183) (emphasis added)).

The *Madsen* standard, then, both recognizes that a range of governmental non-speech interests can justify a speech-limiting injunction and *closely polices* that justification to assure that the speech limitation is in all its aspects in truth *necessary* to protect that governmental interest. And, *Madsen* shows that this developing standard is not merely formulaic, but requires a detailed judicial consideration of whether *each* speech limitation included in an injunction is narrowly tailored both with regard to the kinds of speech activity restricted and with regard to the size and location of the restricted area.

Thus, the *Madsen* Court exhaustively considered not only each separate provision of the injunction, but also, in painstaking detail, "each portion of [its] buffer zone[s]". 114 S. Ct. at 2527. In so doing, the Court *struck down* all aspects of the injunction in question that created prophylactic no-speech "buffer zones" with one exception —the injunction providing for a limitation on demonstra-

exhaustive. Other considerations also support the conclusion that injunctions limiting speech often carry more First Amendment dangers than generally-applicable ordinances controlling speech in public places, including: the availability of enforcement of the injunction through civil contempt proceedings, without the safeguards available in criminal trials; the fact that both the decision to seek injunctive relief and the decision to charge contempts are often in the hands of individuals with strongly held ideological views or practical interests directly opposed to those of the defendants, rather than in the hands of neutral prosecutors; and the limitations on the defendant's right to challenge an injunction on constitutional grounds if charged with a violation of its terms.



tions "within 36 feet of the property line of the clinic" on the *one side* of the clinic nearest its entrance and its parking lot, "as a way of ensuring access to the clinic." 114 S. Ct. at 2526.

That aspect of the injunction was upheld: (1) in recognition that the demonstrators would be "at a distance no greater than *10 to twelve feet*" from their principal target, "the cars [entering] the parking lot" (114 S. Ct. at 2527 (emphasis supplied)); (2) on the understanding that the injunction was for the purpose of protecting clinic access and for no other purpose (*id.*); (3) on the further understanding that the injunction banned the kind of "focused picketing" the Court had long distinguished from handbilling and solicitation which, in contrast, "cannot be completely banned in public places" (*id.*); and (4) because an earlier injunction, proscribing only non-speech activity, "did not succeed in protecting access to the clinic" (*id.*).[5] At the same time, *Madsen* disapproved the thirty-six foot buffer zone insofar as it applied to the non-entrance sides of the clinic, as not "necessary to protect access to the clinic." *Id.*

[5] The courts below were of the view that the failure of a first injunction restricting only illegal acts is not essential to the validity of a "buffer zone" restriction. We believe *Madsen*'s discussion of this point and its repeated invocation of *Milk Wagon Drivers v. Meadowmoor Dairies, supra*, is sufficient to show the opposite. 114 S. Ct. at 2527, 2529. Absent a record of pervasive violence or obstruction which justifies an injunction removing the demonstrators from the scene for a time so as to diffuse conflict and to remove any implicit threat of violence, enjoining speech rather than conduct in the first instance, among other vices, makes it all but impossible later to determine the *necessity* for a speech-limiting injunction, and as a general matter should not be permitted.

We recognize that here the defendants essentially stipulated to the continuation of the original temporary restraining order, premised on a complaint alleging pervasive obstruction through human blockades for many months. In such a situation it may well be that the defendants should not be heard now to complain that the record was not sufficient to justify the original speech limitations.

(B) The injunctive provision here is both broader and narrower than the one approved in *Madsen*. In the first regard, the injunction is not limited to demonstration activity nor are its prohibitions tailored to a particular location near a particular clinic at which defendant wrongdoing had occurred in the past. Rather, the injunction reaches beyond demonstrations to "handbilling and soliciting"; applies generically to all locations at which abortions are performed in the Western District of New York; and creates a "bubble buffer zone" (of fifteen feet from any individual or car entering or leaving the clinic, or from any entrance or exit or parking lot or driveway) that is in actual practice considerably broader in some respects than the "buffer zone" approved in *Madsen*, principally because of its "floating" nature. In the last regard, the reflexive tape measure reaction of the courts below—that this 15-foot "buffer zone" is less restrictive of speech than the one in *Madsen* which reached thirty-six feet from the clinic entrances and exits there—is simply wrong. Rather, the "buffer zone" here places speakers *further* from their addressees in entering cars than the one in *Madsen*, and applies to addressees on foot and in cars considerably more than fifteen feet from the entrances and exits to the clinics.

That the "buffer zones" differ in this respect does not, of course, answer the question whether the injunction in this case is valid, any more than the conclusion that the "buffer zone" here is narrower would do so. Rather, the very point of *Madsen*, ignored not only by the opinions below in this case but in other opinions applying *Madsen*, is that injunctions are *not* statutes applicable to all speakers in an undifferentiated manner, but are justifiable, if at all, by *particular* speaker conduct and by particular circumstances.[6]

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[6] *Compare, e.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1010, 1021 (1995) (approving sixty-foot no-speech "buffer zone" allowing demonstrations only across a busy four-lane road from the clinic because a thirty-six foot zone was allowed in *Madsen* and the difference "is a relatively small difference in degree"); *id.* at 1033 (Kennard, J., dissenting) (the "buffer zone" was not valid because of the greater difficulty, as compared to *Madsen*, of communicating a message to patients and employees driving and walking to the clinic, and because a prior more limited injunction which allowed some communication in the zone had, on the record, succeeded in protecting access.)



At the same time, the injunction here was issued against individual defendants with a long and documented history of physically blockading clinics in the covered area.[7] And, the injunction does not have the feature faulted by the *Madsen* Court in striking down aspects of the 36-foot buffer zone there. This injunction covers only clinic entrances and exits and individuals entering or leaving, not areas near the clinics but not implicated by access-limiting activity. While it may be that these circumstances would justify the injunction, the lower courts have left their justification theory entirely opaque. Three factors explain this discontinuity.

First, the procedural posture of this case is such that it is not possible to identify with any precision the legal wrongs the injunction is intended to remedy. The district court, at the time the preliminary injunction was issued, determined that the plaintiffs had shown a likelihood of success on the merits as to three of their causes of action —a federal cause of action for violation of 42 U.S.C. § 1985(3), a state cause of action for violation of N.Y. Civ. Rights Law § 40-c (prohibiting discrimination or harassment on the basis of sex in the exercise of civil rights), and a state cause of action for trespass. 799 F. Supp. 1417, 1432 (1992). Subsequently, however, the district court determined that under this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the § 1985(3) cause of action had to be dismissed.

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[7] In form, moreover, the injunction allowed for *some* speech activity within the "buffer zone," although in such circumscribed terms as to negate that allowance. *See* pp. 14-15 & n.12, *infra*.

828 F. Supp. 1018, 1020 (1993).[8] On appeal, defendants argued that the remaining two causes of action could not support the injunction, since the state civil rights provision does not authorize injunctive relief and the trespass cause of action is too narrow to justify relief having nothing to do with trespass. 67 F.3d 359, 367 (1994). The Second Circuit panel, however, declined to rule "whether the injunction exceeds its state law basis and whether, if so, other state law and federal law bases exist for this injunction" because that issue was not properly raised. 67 F.3d at 368.

Under general equity principles, "an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law," and to prevent recurrences of those violations. *Madsen*, 114 S. Ct. at 2524 n.3. And, *Madsen* adds a requirement that any speech-limiting injunction provision be *necessary* to remedy a law violation. Thus, while the court below's decision not to rule on a question not properly raised cannot be faulted in its own terms, that decision means that its *Madsen* inquiry rests on an uncertain base. For the likelihood of success with respect to any state cause of action sufficient to support the injunction is a matter left in abeyance.

The district court, it is true, determined that the injunction is justified on the basis of several significant state interests, including the "governmental interest of ensuring that abortions are performed safely" (799 F. Supp. at 1433), "public safety" (*id.*) and protection of the constitutional right to obtain an abortion (*id.*). But injunctive relief must be justified not by significant governmental interests in the abstract, but by those significant governmental interests that are expressed in a legal norm that has been violated.

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[8] Although plaintiffs were accorded leave to amend the complaint with respect to the § 1985(3) cause of action, they have not yet done so as far as we can ascertain.



In the absence of clarity about the statutory or common law violation underlying the injunction—for example, whether that law relates only to protection of private property, as does trespass law, or relates to the protection of medical privacy or of constitutional rights—it is difficult to determine whether each speech-limiting aspect of the injunction is or is not truly necessary to provide relief for that violation.[9]

Second, the injunction here is a generic one, applicable to locations known and unknown in western New York at which abortions are performed. As a consequence, the injunction is not—and could not—be tailored to the geographic layout of any particular location, as was the *Madsen* injunction. In particular, while the fifteen foot limitation was explained by the district court as necessary safely to allow for cars turning into parking lots or driveways (Sept. 27, 1990 Tr. 36), at least some of the clinics in the Western District are presumably approachable from public property on foot as well as by car. And, *Madsen*'s "necessity" standard at the very least would appear to require differentiating such areas, providing for one limitation at those entrances where individuals are approaching in cars and lesser limitations more amenable to normal spoken communication and handbilling at entrances where individuals are approaching on foot.[10]

Third, and of equal importance, the lower courts have not in terms of the *Madsen* standard explained why it is "necessary" to limit forms of communicative activity other

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[9] The importance of relating the substance of speech-limiting injunctions to actual causes of action, as opposed to justifications for speech restrictions based on *ad hoc* judicial determinations of interests and equities, is demonstrated by the abuses that developed during the heyday of the now discredited government by labor injunction regime when that principle was ignored. *See* Frankfurter & Greene, *The Labor Injunction* (1930).

[10] This point could also be accommodated to some degree by altering the "floating" aspect of injunctions like the one here so as to apply differentially to cars and to pedestrians.

than "sidewalk counselling" within the fifteen-foot floating "bubble buffer zone." The felt need to end harassing and intimidating "counselling" techniques absent some explanation otherwise, can, of course, be implemented by allowing *e.g.*, orderly handbilling and sign carrying within the fifteen-foot area, while forbidding grabbing, touching, pushing, shoving, or crowding (799 F. Supp. at 1440), as well as the unwanted following of individuals entering and leaving the clinic. By going further, the "buffer zone" provision effectively forbids non-abusive forms of direct communication and does so without explanation.[11]

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[11] It is quite possible that the reason that orderly handbillers, sign-holders and other such speakers were not accommodated by the district court is that the defendants had no interest in such speech activity and did not ask for such an accommodation. And, unlike statutes, injunctions appropriately are limited to the individuals actually before the court, and are shaped by their litigative strategies and decisions. Our point, then, is not that this injunction must necessarily be modified to accommodate orderly forms of speech not now permitted and not practiced by the actual defendants, but that this Court take care not to sanction, as presumptively valid, injunctions reaching such benign means of expression.

We note that even if there are circumstances involving prior violence, obstruction or tortious harassment in which an injunction barring all communicative activity that brings the speakers within fifteen feet of the addressee could be valid, it is almost certain that a generally-applicable statute so providing would not be. For the inability to engage in such traditional communicative activity would, for reasons developed in Part II, *infra*, substantially burden free speech rights of a substantial number of individuals who have *not* engaged in any wrongdoing. Absent some particularized basis for believing that *all* the individuals affected will engage in wrongdoing, a "time, place or manner" restriction of this kind would therefore be overbroad on its face. This comparison illustrates, then, that despite the lesser standard of scrutiny recognized in *Madsen* for legislation, the tailored nature of injunctions means that speech restrictions can be valid in injunctions when identical restrictions would be invalid if applied across-the-board. *See Howard Gault Co. v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988) (holding statute providing for across-the-board limitations on peaceful picketing invalid); *United Food & Commercial Workers Intern. Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988) (same).



The foregoing is not to say that the injunction as issued (or as slightly modified in the ways suggested above) can not be retroactively justified on the *Madsen* standard on the basis of the voluminous record in this case made in the district court after the close scrutiny mandated by *Madsen*. Our point, rather, is that neither lower court has provided that scrutiny or undertaken the justification task that *Madsen* lays out. In the case of the district court, the failure of explanation is almost certainly due to the fact that the injunction issued before *Madsen* and that the trial court followed the then-standard—and looser—"time, place and manner" standard. In the case of the en banc Second Circuit, the lapses just discussed as surely reflect the view of ten of the fifteen judges on that court that at-the-site appeals to "targeted audiences," in whatever form, are not entitled to the full protection of the First Amendment. 67 F.3d at 394 (opinion of Winter, J., for ten judges (hereafter "Winter opinion" or "Winter majority")). As we now show, that is *not* a proper understanding of the First Amendment's reach.

## II

The Winter majority rests its opinion squarely on the proposition that this case concerns a class of speech activity on the public streets that can be enjoined without the kind of record of repeated unlawful conduct involved in *Madsen*, and without regard to *Madsen's* stringent "narrowest terms" test. *See* 67 F.3d at 396 ("an extensive record of coercion or obstruction is not necessary to justify an injunction requiring physical separation[;] isolated threats or obstructions" are sufficient.)

According to the Winter majority, this disfavored class covers speech activity on the public streets—including efforts by a speaker to talk to, or to handbill, an addressee—"targeted at specific individuals . . . at locations difficult or inconvenient for them to avoid", including

addressees who are "customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic." 67 F.3d at 396.

This is a curious classification, to say the least, since *Madsen* itself involved at-the-site appeals to a "targeted" audience attempting to influence the actions of members of that audience at that site, just as this case does. And *Madsen* specifically holds that in this context, as well as others, the First Amendment requires that " 'our citizens must tolerate insulting, and even outrageous, speech' " (114 S. Ct. at 2529, *quoting Boos v. Barry*, 485 U.S. 312, 322 (1988)), and invalidates blanket injunctive prohibitions on orderly forms of face-to-face communication. *Id.*[12]

The Winter opinion's classification is curious as well because the underlying concern expressed several times—that face-to-face communication concerning contentious issues can lead to unprotected conduct such as pursuing unwilling addressees, crowding addressees at less than arm's length, screaming at addressees at decibel levels above the tolerable—could have been met separately by enjoining such harassing conduct through a set of carefully drafted provisions that do not at the same time sweep in handbillers and peaceful sign carriers and quiet if persistent oral appeals from a civil distance.[13] The established First Amendment law does permit limitations on communicative behavior that turns into harassment through incessant repetition, intolerable noise levels, or physical crowding at closer than normal conversational distance. But the recognition that precise regulation of such conduct is consistent with the First Amendment, does not serve, as the Winter opinion posits, to justify an injunction reaching non-harassing, at-the-site, persuasive appeals that the addressee alter her intended behavior. That is the central teaching of *Thornhill v. Alabama*, 310 U.S. 736 (1940) repeatedly reaffirmed many times since. And, as we now show, properly so.

[12] The injunction at issue in *Madsen* prohibited all communicative approaches to a patient of the clinic unless invited; here, such approaches are permitted, but the intended addressee (or a person in the same group as the addressee) can pretermit all communication *before it begins* by indicating in any fashion a desire not to listen. The net effect is to elevate the desire of the intended audience to avoid *any* communication whatever above the speaker's attempt, however unintrusive, polite, and respectful to begin a dialogue—a result rejected by *Madsen*.

[13] The injunction in this case does reach some of this conduct—crowding, for example, as well as pushing and shoving—but does not attempt to delineate further with specificity the kind of abusive tactics by the "sidewalk counselors" intended to be proscribed.



(A) Almost ten years ago, this Court considered a case arising out of the following incident and the criminal conviction the incident generated:

> [Respondent Raymond Wayne] Hill observed a friend, Charles Hill, intentionally stopping traffic on a busy street, evidently to enable a vehicle to enter traffic. Two Houston police officers, one of whom was named Kelley, approached Charles and began speaking with him. According to the District Court, "shortly thereafter: Hill began shouting at the officers "in an admitted attempt to divert Kelley's attention from Charles Hill." . . . Hill first shouted: "Why don't you pick on somebody your own size?" After Officer Kelley responded: "[A]re you interrupting me in my capacity as a Houston police officer?" Hill then shouted: "Yes, why don't you pick on somebody my size?" [*City of Houston v. Hill*, 482 U.S. 451, 453-54 (1987).]

The testimony showed that Raymond Wayne Hill, the executive director of the Houston Human Rights League, was "prepared to respond in any legal, nonaggressive or nonviolent way, to any illegal police activity", and that

his "motivation was to stop [the officers] from hitting Charles." 482 U.S. at 454 n.1.

Thus, like the antiabortion protestors in this case and the union protestors in *Thornhill*, Mr. Hill, it appears, was communicating with individuals he deeply believed to be engaging in activity both morally wrong and profoundly hurtful of others, in a last ditch effort to convince them not to engage in that activity.

This Court overturned as unconstitutional Hill's conviction under a city ordinance that made it unlawful for an individual to "in any manner oppose, molest, abuse or interrupt any police officer in the execution of his duty." 482 U.S. at 455. The Court stressed that "the First Amendment protects a significant amount of verbal criticism and challenge," including such speech directed to an individual engaged in or about to engage in the disfavored activity. *Id.* at 461-63. That being so, the Housing ordinance "criminalizes a substantial amount of constitutionally protected speech . . . [,] and is facially invalid." *Id.* at 466-67.

Justice Powell's concurring opinion adds that there is sometimes a "fine line" between legitimate criticism of the police and "speech . . . functionally indistinguishable from conduct" such as "persistently attempting to engage the officer in conversation while the officer is directing traffic at a busy intersection" or "run[ning] beside [an officer pursuing a suspected felon] shouting at the officer" and that Hill was on the protected speech side of the line. 482 U.S. at 479 (Powell, J., concurring). And, in response to Justice Powell's point the *Hill* Court noted that his examples "might constitutionally be punished under a properly tailored statute" and emphasized "[w]hat a municipality may not do . . . and what Houston has done in this case, is to attempt to punish such conduct by broadly criminalizing speech . . ." *id.* at 462 n.11. Thus, *Hill* demonstrates both that the kind of harassing tactics the Winter majority focused on here can be prohibited through "properly tailored" provisions and that over-broad provisions prohibiting such conduct *and* trenching on free speech are not consistent with the First Amendment.



While *Hill* differs from this case in many regards—the most obvious being that the speech activity there was directed at government officials, and involved the constitutionality of a criminal ordinance—that case speaks to the issue here in a powerful voice. For *Hill's* reasoning and result demonstrate that the Winter majority's rationale for relegating at-the-site persuasive speech activity on public streets to a First Amendment backwater cannot possibly support that result.

(B) Mr. Hill, labor handbillers promoting a consumer boycott of an unfair employer, animal rights activists seeking such a boycott of a fur store, and anti-war protestors standing in front of a military recruiter's office seeking to dissuade potential enlistees are all on the public streets and are all making use of the streets to engage in direct, in-person persuasion of an individual or individuals who are not out for an aimless stroll but to further some plan of action.

In the *Hill* situation, for example, the policeman is on the scene to monitor the area; in the labor and animal rights situations, potential customers are approaching stores in which they are considering buying something; and in the war protestor situation the potential recruit is considering entry into the military services.

In all these instances, the activists seek to address fellow citizens precisely because of the latters' purpose in being on the public street. And, in all instances, the activists are seeking as their first preference an immediate response by the addressee—not striking a blow in making an arrest, turning away from the abortion clinic, the store or the recruitment office.

At the same time, the activists' appeals can have a communicative impact even where the addressee does not

immediately accept that appeal. Thus, even if the policeman in *Hill* made an arrest using unnecessary force, a policeman so dramatically addressed is more likely to consider the proper means of effectuating his next arrest than one who reads a letter to the editor discussing an improper arrest. Similarly, the pregnant woman, the military recruit or the shopper may go forward with her immediate plan of action, but in so doing and afterwards may nonetheless give thought to the matter of conscience raised by the activist. Indeed, in an era of informational and persuasive overload through a variety of impersonal and commercial media, the long-term impact on listeners of the fact that some of their fellow citizens care enough about a particular moral, political, social or religious issue to take the time and effort personally to communicate their views is likely to have persuasive force of its own.

Nonetheless, according to the Winter majority, such efforts to persuade "targeted audiences"—at a time and place that asks for an imminent response—are at the bottom of the free speech hierarchy and as such are entitled to only the most limited First Amendment protection.

This posit, as we understand it, recognizes that an activist leafletting the general public on a randomly selected downtown street about police abuse or the general evils of abortion or of low wages or of war or of killing animals, or even about the desirability of boycotting abortion clinics, military recruitment offices, or certain stores, comes within the First Amendment's full protection.

The Winter majority's claim rather, is that such protection is lost when that individual seeks to make her appeal more effective by moving to a location, still on a public street, where the audience is composed of individuals whose very presence demonstrates that her message speaks to the addressee's situation.

(C) To take the most settled point in the First Amendment jurisprudence first, proponents of a cause who ad-



dress the general public on random street corners *do* engage in speech activity fully protected by the Constitution. This Court has repeatedly made clear that the First Amendment protects a citizen's right broadly to disseminate ideas to the public at large while present on those open public locations where the public traditionally gathers, including, particularly and preeminently, ordinary public streets.

"Communicating thoughts between citizens, and discussing public questions" is a "use of the streets and public places that has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." *Hague v. CIO*, 307 U.S. 496, 501 (1939). Thus, "streets, sidewalks, and parks, are considered, without more, to be 'public forums' " (*United States v. Grace*, 461 U.S. 171, 177 (1983)), as to which "the government's ability to permissibly restrict expressive conduct is very limited" (*id.*).

At the same time, the public streets, of course, are used by the citizenry not simply for loitering, for recreation and for social intercourse but as a "necessary conduit in . . . daily affairs." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 651 (1981). Individuals use the streets as an indispensable means of reaching all manner of destinations vital to their lives—clothing stores, drugstores, food stores, lawyers' offices, doctors' offices, schools, courthouses, government office buildings, convention centers, and so on.

That being so, it would reduce the First Amendment protection to the vanishing point to hold that the citizen right to make use of the ordinary public streets to communicate with other citizens lapses near the entrance to every facility which the addressee has an important reason to enter. In recognition of that consequence the Court has rejected the efforts to so limit free speech on the public streets:

> Traditional public forum property occupies a special position in terms of First Amendment protection

> and will not lose its historical character for the reason that it abuts . . . property that has been dedicated to a use other than as a forum for public expression. [*United States v. Grace, supra,* 461 U.S. at 180.]

It is well-established law, as well, that the right to communicate on the ordinary public streets extends not only to the right to propound abstract ideas or to provide information concerning religious, political, social and moral issues—that war is bad, for example, or that African-American workers suffer employment discrimination, or that cutting trees endangers the spotted owl—but also specifically to exhort the addressees, in the common interest, to advance a cause by putting aside their narrow, individual interests and by altering the behavior their individual interests would dictate. The First Amendment extends

> to more than abstract discussion, unrelated to action. . . . "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. [*Thomas v. Collins,* 323 U.S. 516, 537 (1945).]

That is why Mr. Hill's effort to persuade a policeman to stop an abusive arrest was within the free speech protection. And, similarly, the First Amendment protects the right "through personal solicitation" to request private citizens "to join . . . [in] common cause" by refusing to do something the addressee has every right as an individual to do—for example, shopping at a particular store or joining the army or attending a particular meeting—because such a refusal would be in a larger social interest. *NAACP v. Claiborne Hardware, supra,* 458 U.S. at 909.

In the labor dispute context, for example, this Court more than fifty years ago recognized that the fact that "some of those reached [may] refrain from entering into advantageous relations with the business establishment



which is the scene of the dispute" does *not* deplete the First Amendment protections accorded the speaker seeking that result:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. [*Thornhill v. Alabama, supra,* 310 U.S. at 104] [14]

*See also NAACP v. Claiborne Hardware, supra,* 458 U.S. at 909 (reaffirming *Thornhill's* protection of speech seeking to induce individuals not to trade with businesses because of the businesses' employment practices).

(D) The question then becomes whether, as the Winter majority posits, the strong protection accorded the free speech right of each citizen to advocate a moral or social cause on the public streets, and to request the addressee to abstain from actions that the latter might otherwise undertake, becomes attenuated when the speaker chooses to present her argument to "specific individuals targeted at locations difficult or inconvenient for them to avoid." 67 F.3d at 396.

As *Hill* shows, this Court's cases answer that question by affirming that the First Amendment protection *does* extend to speakers who are at the site that is at the center of their concern and of their addressees' interest, rather than at remote sites, and who are asking for an immediate rather than a future response. *See Thornhill v. Alabama,*

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[14] Although *Thornhill* is usually referred to as a picketing case, in fact the incident that gave rise to the case involved no patrolling or other conduct now thought to define picketing. Rather, Thornhill approached a worker outside a struck plant and asked him not to work that day. The worker was not threatened, nor was he "in fear." 310 U.S. at 94. And, after hearing Thornhill's exhortation, the worker did decide not to work.

*supra*, 310 U.S. at 91-92, 105-106 (statute forbidding protestors from going "near . . . the . . . place of business of any person . . . for the purpose of . . . inducing other persons not to trade with . . . such persons" as "limited or restricted in its application to such action as takes place at the scene of the labor dispute" is unconstitutional); *NAACP v. Claiborne Hardware, supra*, 458 U.S. at 903, 909-910. Those precedents could not be more right.

(i) Contrary to the suggestion in the Winter majority opinion, the speaker's free selection of the intended audience *is* an integral part of the freedom of speech. The speaker's "targeting" of her audience is the norm for newspapers, magazines, radio and television stations, charitable solicitors, political candidates and lobbyists. And, speakers select their audiences because speakers are finite beings: It is normally a waste of time and effort to reach an undifferentiated audience with a message meaningless to many of them; it costs more to reach a larger audience; and speech addressed to everybody tends to be so diffuse as to reach nobody.

Mandating that a speaker must address a much broader audience than she wishes to address in order to speak at all is to place a heavy and pointless burden on the right to speak. An order that the Boston Globe, if it is to print at all, must set up distribution systems and ship newspapers to Des Moines, New Orleans, and Seattle as well as to the Boston area, for example, would impose a financial burden on the freedom of speech at least as serious as a tax on newspapers and magazines (*see, e.g., Leathers v. Medlock*, 499 U.S. 439, 447 (1991)), and would interfere with the newspaper's editorial determination—in this instance, to tailor its content to the Greater Boston audience—as least as much as an order to print retractions for misstatements (*see, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255-58 (1974)).



Thus, the First Amendment commitment to speaker autonomy cannot be squared with governmental dictation of the speaker's audience. Rather, given its impact such dictation is a form of direct censorship.

(ii) The Winter opinion is also mistaken in its premise that the First Amendment fully protects only "purely rational" means of persuasion and therefore enables the government to impose a period of repose to assure a fully considered, rather than impetuous, responsive decision. According to that opinion, communications that use "shame", "epithets", "strong language" or breach "rules of etiquette" are not exercises in protected free speech but are "coercive conduct" that is tolerated under limited circumstance to avoid chilling "real" free speech. 67 F.3d at 395-96.[15]

The First Amendment, however, protects the communication of strongly felt emotions meant to induce an immediate commitment in the manner of evangelical preachers, just as the Amendment protects the circulation of well-formed syllogisms appropriate to philosophical reflection—and must do so to serve its free speech purposes.

It is not the case that the First Amendment's *only* office is to foster fully reasoned exchanges that are part of a searching, deliberative decisionmaking process. Rather, the free speech protection advances as well "[t]he individual's interest in self-expression" (*First National Bank v.*

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[15] Throughout its opinion the Winter majority uses the term "coercive conduct" in a manner that clearly applies to words rather than action, and that assumes that the very same words can be "coercive" or not depending upon "the forum and the ability of the audience to avoid the protest at little cost." 67 F.3d at 397. Thus, while one is tempted to agree that the First Amendment does not protect "coercive conduct" because the Amendment does not protect conduct at all, it is plain that the Winter majority uses the term "coercive conduct" to refer to speech deemed to be unprotected because of the *speech's emotional content* and the relationship between the audience and the location at which the speech is uttered, and not to nonexpressive activity.

*Bellotti*, 435 U.S. 765, 777 n.12 (1978)), recognizing that "[t]he freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself" (*Bose Corp. v. Consumer's Union*, 466 U.S. 485, 503-04 (1984)).

The Winter majority would denigrate this aspect of the First Amendment's rationale as one that makes "the First Amendment . . . a governmental version of a psychiatrist's couch." 67 F.3d at 395. That bespeaks a small minded view of protecting each citizen's expressional autonomy. As this Court has recognized, the breadth of the First Amendment's protection advances "the common quest for truth and *the vitality of society as a whole*". *Bose Corp., supra*, 466 U.S. at 504 (emphasis supplied):

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion. . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. [*Cohen v. California*, 403 U.S. 15, 24 (1971).] [16]

Equally to the point, First Amendment jurisprudence recognizes that putting the interest in autonomous self-expression to the side, communication directed at stirring the listener's emotions is not of lesser value than that

[16] *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("our pluralistic society [is] constantly proliferating new and ingenious forms of expression"); *Winters v. New York*, 333 U.S. 507, 510 (1948) (("We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. . . . What is one man's amusement, teaches another's doctrine.").



directed at stimulating the mind's abstract reasoning processes:

> Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotion as well. We cannot sanction the view of the Constitution that, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which practically speaking may be the more important element. [*Cohen v. California, supra*, 403 U.S. at 26.]

The " 'emotive impact of speech is not a "secondary effect' " unrelated to the content of the expression itself." *Texas v. Johnson*, 491 U.S. 397, 412 (1989), *quoting Boos v. Barry, supra*, 485 U.S. at 321. Rather, the right to persuade includes the speaker's right, through her choice of words, themes and images, to communicate the fervency of her views as well as their cognitive content, and to appeal to emotions such as shame, sympathy, and desire for social acceptance as a basis for decisionmaking. *NAACP v. Claiborne Hardware, supra*, 458 U.S. at 910-11 (First Amendment protects "persuasion . . . to join the boycott through social pressure and the 'threat' of social ostracism"). [17]

Candidates for public office, for example, do not lose their First Amendment protections in fashioning their campaigns because they seek to enlist voters to their side through the emotive force of their appeals, rather than

[17] Recent research into the anatomy and functioning of the human brain has confirmed the insight in *Cohen* that effective decisionmaking depends at least as much, if not more, on emotional understandings as on abstract reasoning. *See* Antonio R. Damasio, *Emotion, Reason, and the Human Brain* (1994); *see especially id.* at 34-51 (recounting the case of a formerly successful individual who, after suffering brain damage, retained his intellectual mental capacities "[b]ut his ability to make decisions was impaired" because of "a reduction in emotional reactivity and feeling").

through reasoned demonstrations of the superiority of their candidacy or of their public policy positions.

Speech that is "provocative and challenging" is more likely than rote repetition of known truths to "strike at prejudices and preconceptions and have profound unsettling effects as it presses for the acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Thus, such speech serves to open up the rational faculties so that new ideas can be considered on their merits, rather than rejected out of habit or tradition and is protected by the First Amendment for that very reason. *See Gooding v. Wilson*, 405 U.S. 518, 525 (1972) (distinguishing such speech from "fighting words", which may be proscribed).

(iii) The final premise of the Winter majority's analysis is that at-the-site advocacy of a cause is "inherently coercive" because the audience's presence at the site is dictated by the desire to meet a need and is, thus not "voluntary" (67 F.3d at 396), and because the communication asks the listener for moral, social, or political reasons to suffer the "cost" (*id.*) of foregoing the individual's intended action at that site. In this, the Winter majority is, once again, wrong.

*Most* people using the public streets are going somewhere for some purpose. Thus, exposure to communicative activity on city streets pleading a moral or social cause is normally both involuntary and inconvenient in the Winter majority's terms. And, this exposure does not differ with regard either to voluntariness or inconvenience when it is in front of a facility the addressee wishes to enter rather than on a street the addressee must traverse to reach that facility; in either case, the addressee can avoid the location, but only at the "cost" the Winters majority posits. 67 F.3d at 396.

Thus, the Winters majority's modest proposal for limiting the scope of free speech by advocates of a cause on the public streets is in fact its death warrant. If this degree of intrusion on the addressee's interests overcomes the free speech right, that right has no substance.



This Court has so recognized and has repeatedly held that the short-term inconvenience or annoyance of limited exposure to an unwanted message for the limited time it takes to pause to consider a speaker's address and then to walk or drive past the speaker if that is the addressee's desire is *not* a basis for ending free speech on the public streets but the inevitable and acceptable cost of free speech. *See, e.g., Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971) ("The First and Fourteenth Amendments do not permit State to make criminal the exercise of the right of assembly simply because its exercise may be annoying to some people"); *Boos v. Barry, supra*, 485 U.S. at 321 (shielding diplomatic personnel from unwelcome speech on public sidewalks abutting the embassy where they work is not a justification consistent with the First Amendment).[18]

While the Winter majority supposed otherwise, the situation here in fact has nothing to do with the so-called "captive audience" situations. The latter class is composed of situations in which an individual in a nonpublic forum is forced to suffer repetitive exposure to speech that may go on for hours or days as part of her daily rounds, not to exposures on public streets that take minutes or seconds from time to time. *See, Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (distinquishing the "captivity" of a passenger on a bus from street speech encounters); *Madsen*, 114 S. Ct. at 2529 (discussing "captive audience" analysis only with respect to those in the clinic and not with respect to those on the public streets). Individuals not in an enclosed loca-

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[18] Where the message is communicated only through signs or handbills, the addressee will be an unwillingly subject either fleetingly or not at all, since she can refuse to read the handbill or can avert her eyes from the signs. *Erznoznik v. City of Jacksonville, supra*, 422 U.S. at 210.

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tion but on a street can cut off unwanted expression by walking or driving on.

By the same token the Winter majority's attempt to metastasize this Court's cases providing particular protection against unwanted speech within the home into a general protection against all unwelcome expression flies in the face of the very precedents cited. It is difficult to imagine clearer language stating that the cases culminating in *Frisby v. Shultz, supra,* cannot be freely extrapolated from their context than *Frisby's* declaration that "[*T*]*he home is different*. . . . Thus, we have repeatedly held that individuals are not required to welcome unwanted speech *into their own homes* . . ." 487 U.S. at 485; see also *id.* at 484 ("Our prior decisions have often remarked on the *unique* nature of the home . . ."). *Frisby* and its precursors that recognize a heightened privacy interest in the home are thus at the opposite end of the spectrum from cases involving speech on the ordinary public street where privacy interests have the *least* force.

The Winter majority was also of the view that speech activity directed at those approaching a site whose message seeks to dissuade the addressees from carrying through a contemplated course of action there is not free speech but coercive conduct that denies the addressees their freedom. This is what we take to be the point of the court below's insistence that the Constitution "require[s] that individuals who are subject to advocacy be left free to make up their own minds and to adhere to their convictions or intended courses of conduct should they remain unpersuaded." 67 F.3d at 395.

That view supposes that each citizen enjoys a right to act as he desires without being subject to direct communicative efforts to dissuade him from that action. But we know of nothing in this Court's decisions or in the Constitution that creates such a right. And, in the absence of that right, recognizing the legitimacy of at-the-site advocacy does not deny the "targeted audience" any legally cognizable freedom interest.



To be sure individuals who are insulated from those who question the rightness of their actions are more likely to carry through than those who must determine to act after being faced with such a question. That likelihood is not however a basis for silencing the speaker. As the Court made clear in *Organization for a Better Austin v. Keefe, supra,* 402 U.S. at 419-420, publicizing an individual's offensive business practices is not an "invasion of privacy" that can be enjoined consistently with the First Amendment even though "the expressions were intended to exercise a coercive impact on respondent" to sign an agreement to end those practices.

Indeed, the labor dispute example demonstrates the degree to which it would compromise the public dialogue to give credence to the claim that a "targeted audience" is unfairly "coerced" by at-the-site speech that asks the addressee to make an immediate decision on an issue the speaker believes is of moral or social consequence. Labor disputes bring to the surface a profound disagreement as to whether or not the individual's decision—to buy at or work in a struck store, for example—*is* one of purely private concern, or instead *is* one that can entail a breach of a communal responsibility to the public generally (or to a subgroup thereof). For the government to prevent free speech on the ground that the addressee's decision is in truth purely private and that the speakers' moral argument and moral witness are of no consequence because the latter's ultimate position is wrong on its merits would be for the government to take one side of the argument on where autonomy ends and community begins. That, we submit is not the government's role in this free society.

(E) At-the-site persuasive speech activity by its nature involves corporal beings who are the speakers and others who comprise the audience—and not disembodied minds and spirits. To that extent the speech involves an irreducible element of conduct and the conduct involves an irreducible element of direct contact and of cognate effects on

the site's human environment. No matter how peaceful and orderly the speakers are, their very physical presence and their course of speech activity will have radiating effects on the audience. Our showing has been that such speech activity is not taken out of the First Amendment by its persuasive nature, its call for a response or its inherent physical dimension. And, an integral part of that showing has been that such communicative activity is not properly denominated as coercion or some other improper invasion of the "targeted" addressee's legitimate freedom to make his own decisions on his course of action.

## CONCLUSION

For the reasons stated above, this Court should reject the analysis proffered by the Winter majority and subject the injunction in this case to the same stringent analysis with respect to the necessity of each speech restriction applied in *Madsen v. Women's Health Center, supra.*

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

No. 95-1065 (9)

In The

# Supreme Court of the United States

October Term, 1995

PAUL SCHENCK, et al.,

*Petitioners,*

vs.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.,

*Respondents.*

**On Writ Of Certiorari To The Court Of Appeals For The Second Circuit**

## BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC., AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC. AND INDIANA CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY AND SUGGESTING REVERSAL

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## BRIEF FOR AMICI CURIAE

## INTEREST OF AMICI

Amici are state affiliates of the American Civil Liberties Union in Florida, Ohio and Indiana. Each is a separately incorporated, non-profit public interest law organization devoted to protecting constitutional rights and civil liberties. Amici represent clients who have engaged in public protest activities and against some of whom injunctive relief is currently being sought by private parties seeking court-imposed restrictions on those protest activities. Those clients' interests and rights under the First Amendment may be impacted directly by the Court's decision in this case. Amici believe that the First Amendment analysis undertaken in the circuit court decision under review is inconsistent with the proper standards established by this Court, and if left uncorrected, could have a damaging effect generally on the rights of protesters well outside the particular controversy of abortion.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The grant of certiorari in this action contemplates a determination whether two provisions of a 1992 injunction issued by the United States District Court for the Western District of New York are consistent with the First Amendment. One contested provision of the injunction imposes a fifteen-foot "floating" buffer zone, which attaches not only to the entrances and driveways of clinic private property, but also to "any vehicle or person seeking access to or leaving such facilities," including non-

patients and non-health care providers. *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 393 (2d Cir. 1995) (en banc) ("*Schenck*"). The second contested provision provides an exception to the buffer zone for up to two "sidewalk counselors" who may engage in "conversation of a non-threatening manner." These designated individuals must "cease and desist" and retreat outside the floating buffer zone, however, if a recipient of their message "wants to not have counseling, wants to leave, or walk away." 67 F.3d at 390.

These injunctive measures reflect novel and unwarranted exercises of judicial power limiting speech, imposed by the district court under an improper standard. In prior cases before this Court involving labor disputes, racial and civil rights disputes and student protests, restrictions on public protest activities have been tempered by careful fidelity to core First Amendment principles, even when speech has been accompanied by acts of violence, obstruction and threats. *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *cf. Cox v. Louisiana*, 379 U.S. 536 (1965). The Court's one decision addressing restrictions on an anti-abortion protest, *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), expressed its close adherence to the constitutional standards established in these earlier cases. 114 S. Ct. at 2526.

Because *Madsen* permitted imposition of a buffer zone at an abortion clinic, however, the decision may have spawned exceptions to the *Milk Wagon/Carroll* line of



precedent that the Court did not intend.[1] Here, for example, the Second Circuit – nominally applying *Madsen* – upheld the district court's injunction under an analysis which broadly extends captive-audience doctrine to traditional public fora and which transforms unwanted verbal messages into a "constructive blockade" meriting injunctive relief. *See Schenck*, 67 F.3d at 383 and 393. These interpretations of *Madsen* border on *de facto* content-based restrictions, and if left uncorrected, could have chilling consequences well beyond the abortion protest context. The Second Circuit's decision provides a strong indication that the standard articulated for injunctions in *Madsen*, 114 S. Ct. at 2525 ("burdens no more speech than necessary" to serve a significant government interest), without more, furnishes insufficient guidance to ensure First Amendment standards are applied in the anti-abortion protest context in a manner consistent with other, equally divisive public protest contexts noted above.

The Court should clarify that, under *Madsen*, an injunction is *not* narrowly tailored to "burden no more speech than necessary" to serve a significant government interest unless "the essential needs of the public order" are at stake and the injunctive decree is "couched in the

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[1] Significantly, the decision in *Madsen* was premised "on the *assumption* that the evidence and testimony before the [trial] court supported its findings . . . ", since the petitioners in that case never certified the factual record on appeal. 114 S.Ct. at 2527-28 (emphasis added). The Court in that case strictly refrained from engaging in the independent review of the record it ordinarily undertakes in cases involving the First Amendment. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. at 915-16 n. 50.

narrowest terms that will accomplish the pin-pointed objective." *See Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. at 183. Consistent with this standard, judicial power creating a buffer zone should be exercised only when the plaintiffs have stated a proper cause of action against the defendants; a prior injunction, applying only to unlawful conduct, has failed to contain the unlawful activity; the defendants' unlawful activity pervasively threatens the public order; the order allows retention of fundamental free speech rights in each location; and the order is narrowly tailored so that any speech-related restriction has an articulated and direct relation to the curbing of unlawful conduct.

Amici believe that, when tested fairly against these standards, the two injunctive provisions at stake in this case are unnecessarily restrictive. Particularly since the Second Circuit chose to apply *Madsen* standards *post-hoc* to a pre-*Madsen* order constructed by the district court under a "reasonable time, place and manner" standard, it would be proper for this Court, after clarifying the proper standards, to remand the case for an initial determination by the district court under those standards, in view of a trial judge's discretionary role in fashioning injunctions.

## ARGUMENT

### I. The Applicable Standard

In *Madsen v. Women's Health Center*, 114 S. Ct. 2516, 2525 (1994), this Court adopted the following applicable



standard: "Whether the challenged provision of the injunction burdens no more speech than necessary to serve a significant government interest." The Court observed that " 'injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs.' " 114 S. Ct. at 2525 (*quoting Califano v. Yamaski*, 442 U.S. 682, 702 (1979)). Citing *NAACP v. Claiborne Hardware*, 458 U.S. at 916 and *Carroll v. President and Comm'rs Princess Anne*, 393 U.S. at 183-84, the Court further noted that "when sanctionable 'conduct occurs in the context of constitutionally protected activity . . . ' 'precision of regulation is demanded.' " *Id.* Significantly, the Court stressed that the standard articulated in *Madsen* is the functional equivalent of *Carroll's* requirement that an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction. *Madsen*, 114 S. Ct. at 2526 ("We fail to see a difference between the two standards.")

The standard adopted in *Madsen* reflects a conception that neither the state nor private parties "ordinarily" should rely on injunctions to serve their interests in regulating abusive expression. Such injunctions come to the Court "bearing a heavy presumption against constitutional validity." *Carroll*, 393 U.S. at 181. Although not content-based *per se* (*Madsen*, 114 S. Ct. at 2523-24), such injunctions nonetheless are directed specifically against particular speakers, organizations, and protests, and reflect judge-created norms untethered from a more broad-based legislative process. *See Madsen*, 114 S. Ct. at 2424 ("Injunctions carry greater risks of censorship and discriminatory application than do general ordinances.") They also can be enforced through civil proceedings,

without jury trials or a criminal standard of proof. *See generally Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 426-27 (1911).

As a consequence, and as the Court has taken pains to emphasize in the past, only the most exceptional circumstances warrant imposition of governmental authority to curb speech:

> [T]he right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force . . . [The] protestor's right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing because it may provoke violence in others.

*Milk Wagon Drivers*, 312 U.S. at 293 and 296.[2] The Court subsequently has stressed that a ban on otherwise lawful, peaceful expressive activity can be justified only where "a

[2] *Milk Wagon Drivers* provides a paradigm of when an injunction curbing speech activities may be appropriate. There, the court documented "violence on a considerable scale," including "more than fifty instances of window-smashing; explosive bombs causing substantial injury . . . ; [five] stench bombs," several wrecked trucks, arson of a store and two trucks, severe beatings of a store-keeper, a trucker and workers, one shooting and a number of threatened shootings. 312 U.S. at 291-92. The conduct described by the district court in this case does not appear to rise to the level of violence encountered in *Milk Wagon Drivers*. *Compare Pro-Choice Network v. Project Rescue*, 799 F.Supp. 1417, 1424 (W.D.N.Y. 1992) ("[D]emonstrators crowd around people trying to enter the facilities . . . and grab, push and shove the patients, patient escorts and staff.")



pattern of violence was established which would inevitably reappear in the event picketing were later resumed." *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (declining to permit ban on peaceful picketing under *Milk Wagon Drivers* because "[w]hat violence there was was scattered in time and much of it was unconnected with the picketing"); *NAACP v. Claiborne Hardware*, 458 U.S. at 923, 924 n.67 ("this case is not like *Milk Wagon Drivers* . . . in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity. The violent conduct present in that cases was pervasive . . . [T]he injunction must be modified to restrain only unlawful conduct . . . ").[3] *Cf. Carroll*, 393 U.S. at 180 (speech loses "the broad guarantee of the First Amendment" only in those "special, limited circumstances in which speech is . . . interlaced with burgeoning violence.").

## II. The Floating Buffer Zone and Cease and Desist Provisions are Incompatible with the *Madsen* Standard Under the Stated Findings of the District Court

The district court in this case created a floating fifteen foot buffer zone using a "reasonable time, place and manner" standard of analysis. Coupled with the cease and desist provision of the injunction, the "floating"

[3] Instructively, *Claiborne Hardware* characterized past unlawful acts (including shots fired at several homes, a brick thrown through a windshield, two beatings and damage to private property) as "isolated acts of violence during a limited period." 458 U.S. at 924.

nature of the buffer zone effectively imposes on protestors a thirty foot swath around each individual and vehicle entering a clinic, without beginning and without end. The Second Circuit upheld these restrictions, relying in part on a rationale that persons in a public forum seeking access to an abortion clinic are a captive audience who should be free from unwanted speech. *Schenck*, 67 F.3d at 392. The Second Circuit's analysis reflects misapplication of the *Madsen* standard.[4]

### A. The Appropriate "Significant" Government Interests

The district court identified three governmental interests underlying the injunction: (1) protecting the health and safety of patients; (2) securing public safety by preventing physical blockades and preventing defendants from "abusing, grabbing, touching, pushing, shoving or crowding persons entering or leaving the clinics[;]" and (3) "ensuring 'that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another.' " *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1433 (W. D. N. Y. 1992). The Second

[4] For purposes of First Amendment analysis, it is particularly important in the abortion context that, without minimizing the very grave and abhorrent violent acts that have occurred at some clinics, courts resist ascribing the motivations and tactics of individuals committing those acts to all organized and active protest against abortion activities. As with any social protest movement, be it in areas of labor, civil rights, or anti-war efforts, abortion protestors hold wide disparities in beliefs about appropriate speech, conduct and tactics.



Circuit accepted these interests as "significant." 67 F.3d at 387.

The significance of the second government interest appears uncontroversial, but the first proffered interest warrants careful examination by the Court. While protecting the health and safety of its citizens is of course a strong government interest in the abstract, a too-easy acceptance that health and safety concerns are a "significant" government interest under *Madsen* opens the door to a new form of heckler's veto advanced in the guise of medical gloss. The recipient of an uncomfortable or unwanted message need only provide medical testimony that exposure to that message could adversely affect his or her physical or mental health in order to enjoin the speech at issue. For example, a business owner with high blood pressure could banish labor picketers to a large buffer zone because of the potential health-related consequences of hearing the picketers' taunts. A midwestern community with a large population of elderly concentration camp survivors could restrict a planned neo-Nazi march based on evidence of mental and physical medical risks presented by such speech. *Cf. Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

In this case, the district court's findings concerning increased health risks to patients stemming from petitioners' demonstration activity are notably unquantified and hypothetical. *See Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1427 (finding increased stress and anxiety "can" cause patients to have elevated blood pressure, hyperventilate, require sedation, require counseling, and become agitated, thereby "increasing the risks associated with surgery," but not specifying what or how serious

those risks are). While the health risks may very well be quantifiable and real, such concerns should not assume the mantle of a "significant" government interest warranting restrictions on fundamental rights of free speech without particularized evidence and findings of a clear and present danger of serious medical harm by the trial court. Otherwise, as in the decision below, "the guarantees of the Bill of Rights [may] be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers*, 312 U.S. at 293.[5]

### B. The Contested Injunction Provisions Fail to Meet the Proper Constitutional Standard

In *Madsen* this Court struck as unconstitutional the functional equivalent of the floating buffer zone imposed by the district court in this case. That provision restrained protestors from physically approaching any person seeking abortion services within three hundred feet of the clinic. 114 S. Ct. at 2529. Similar to the "bubble" provision in *Madsen*, which was instituted to prevent patients from being "stalked" and "shadowed", 114 S. Ct. at 2529, the buffer zone, coupled with the cease and desist provisions

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[5] The third proffered government interest appears misconceived, insofar as this case, properly understood, does not involve a balancing of constitutional rights. A private party's attempts to prevent individuals from performing or undergoing abortions does not violate any provision of the Constitution. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 267-78 (1993). The only potential constitutional violations in this action inhere in the speech restrictions imposed by the lower federal courts.



in this case, fails to meet the proper constitutional standard under *Carroll* and *Madsen*.

The floating buffer zone broadly restricts speech directed to individuals who are neither patients nor health care providers. Its thirty foot swath effectively prevents protestors from conversing with and presenting written material to other individuals in a non-obstructive and non-threatening manner.[6] Permitting two sidewalk counselors to breach the floating buffer zone does not meaningfully ameliorate this significant restriction on the speech of all other protestors.

The "sidewalk counselor" provision more egregiously sweeps protected speech into its prohibition, and can effectively suppress all dialogue, without serving any significant government interest. Instructively, this Court noted in *Madsen*:

> Absent evidence that the protestors' speech is independently proscribable (i.e. 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, [the provision prohibiting demonstrators from physically approaching patients unless invited to do so] cannot stand.

114 S. Ct. at 2529. Yet, in this case – even when 'fighting words' or threats of violence are wholly absent – any recipient of a sidewalk counselor's message can subjectively transform pure speech into impermissible conduct,

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[6] Ironically, by keeping demonstrators so far back they must raise their voices to be heard, it also undermines the more polite level of political discourse the provision apparently is intended to advance.

exposing the sidewalk counselor to possible arrest and detention, by "indicat[ing], either verbally or non-verbally, that they do not wish to be counseled." *Pro-Choice Network*, 799 F. Supp. at 1434. Such a provision hardly bears material distinction from the provision struck in *Madsen* prohibiting all uninvited approaches of persons entering a clinic. *See Madsen*, 114 S. Ct. at 2529.

The district court acknowledged the substantial speech interest protestors have in conversing with and offering written material to patients. *Pro-Choice Network*, 799 F. Supp. at 1432. ("There is no question that defendants' activities constitute a form of political speech protected by the First Amendment. Defendants are entitled to express their views on abortion, 'particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted.' ") (citations omitted). But it erroneously concluded that these interests were adequately accommodated by its provision permitting only two protestors to approach the patient to converse and offer literature. 799 F. Supp. at 1434 ("In an attempt to accommodate fully defendants' First Amendment rights, the Court . . . has made an exception to the 'clear zones' for sidewalk counselors."). By limiting the number of sidewalk counselors, the court substantially and unnecessarily burdened the speech interest of all other protestors.

## III. Clarification of the *Madsen* Standard

The infirmities of the present injunction suggest that the standard enunciated in *Madsen* needs clarification in order to instruct federal courts on adequately protecting



free expression rights in injunctions restricting protest. Several principles are suggested by the Court's own injunction cases, by First Amendment principles, and by the *Madsen* and *Carroll* standards themselves.

First, there should be no injunction without an express finding that the plaintiffs have stated a valid cause of action against the defendants who are to be restricted by the injunction. Injunctions are remedies to be imposed when a cause of action is proven or has a probability of success, and are not an opportunity for free-wheeling judicial activism seeking to promote social order. "The First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *City of Houston v. Hill*, 482 U.S. 451, 472 (1987).

Second, except in the "flagrant violence" situation, *see Milk Wagon Drivers*, any injunction should ordinarily be limited, in the first instance, to restraining illegal conduct. *NAACP v. Claiborne Hardware*, 458 U.S. at 924 n.67. If and only if that restraint fails to curb the illegal conduct is there any basis at all for believing that a broader injunction is necessary. Moreover, an incremental and location-specific approach should be required. The continuation of certain illegal conduct after an initial injunction would not justify a speech-restricting injunction that controls conduct of a different kind or in a different location.

Third, only where controlling the unlawful conduct at issue is "essential to public order," *Carroll*, 393 U.S. at

183, can circumstances justify an injunction impinging on legitimate expressive activity. Thus, only activity that is pervasively threatening to the safety of others can provide the necessary predicate. Even if the district court here legitimately found such a predicate, which appears doubtful in view of the comparative predicates found in *Milk Wagon Drivers* and *Claiborne Hardware*, it is questionable whether the same injunctive relief properly should have been upheld by the Second Circuit, applying *Madsen* in 1995. In the interim, the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE"), proscribing "force," "threat of force" and "physical obstruction" at abortion clinics was enacted. By adding federal law enforcement capabilities, as well as draconian punishments, the FACE Act reduced, and perhaps eliminated, the earlier predicate for injunctive relief that ordinary remedies at law are inadequate. The district court on remand should consider the need for continued injunctive relief in light of the FACE Act.

Fourth, to be "tailored as precisely as possible to the exact needs of the case," *Carroll*, 393 U.S at 184, each aspect of any injunction that affects speech activity should do so in measured increments and to the least degree necessary for eliminating intolerable unlawful conduct underlying the injunction. In particular, the physical area covered by any restriction on communicative activity should be as confined as possible and based on site-specific justifications. Absent the type of extreme and pervasive violence found present in *Milk Wagon Drivers*, peaceful expressive activity should not be entirely forbidden within any area. In this case, the



injunction upheld by the Second Circuit applies in blanket fashion to seven clinics, and is not remotely tailored to specific clinics or justified by specific acts indicating a probability of actual or continued unlawful conduct at each of the sites.

Lastly, any injunction issued as a result of unlawful conduct should carefully limit provisions affecting speech to be narrowly responsive to the pervasive unlawful conduct that triggers its issuance. In other words, a direct, articulable nexus must exist between each speech-related restriction and the need to curb unlawful conduct. The fact that some petitioners engaged at one time in some unlawful, enjoinable conduct should not be an adequate predicate for a wide-ranging injunction on expressive activity by them and others.

Here, the district court found that Project Rescue had in fact complied commendably with the TRO issued earlier in the case. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424 n.5. Therefore, logically there could be no reasonable finding that the institution of a floating buffer zone was necessary to prevent future illegal activity. The Second Circuit sidestepped this peculiar absence of a key predicate for an injunction by merging *both* past illegal activity of protestors and their protected speech into the rubric of a "constructive blockade" having "the same goals as the physical blockades." *Schenck*, 67 F.3d at 382-83. This concept transforms speech into conduct by virtue simply of the speech's content or the speaker's purpose, and dangerously implies that public fora are

reserved only for tepid debates rather than divisive moral and political issues.[7]

## CONCLUSION

The judgement of the circuit court should be reversed.

Respectfully submitted,

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[7] The lower courts in this action appeared to be of the view that the petitioners' purpose of deterring patients and staff from entering a clinic was itself improper, at least if it ever succeeded. If so, their notion of a "constructive blockade" would revolutionize First Amendment law if it were applied to picket lines conducted by labor unions, economic boycotters, or any number of other groups. One of the ordinary purposes of a picket line is to dissuade people from crossing it, and success in that purpose is a *vindication*, not a violation, of the First Amendment unless accomplished by physical force or threats.

MOTION FILED
MAY 1 4 1996

No. 95-1065

(10)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

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**PAUL SCHENCK**

PETITIONER

v.

**PRO-CHOICE NETWORK OF WESTERN NEW YORK**

RESPONDENT

---

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN IN SUPPORT OF NEITHER PARTY

---

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38 pp

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

Interest of Amicus

The amicus curiae brief, which does not support either party, defends the constitutional right to life of the unborn, which the parties have not done.

Argument

The amicus proves that the Fourteenth Amendment's universal guarantee of life to "any person" does include the unborn. Thus this Court must not only overrule Roe v. Wade, 410 U.S. 113, it must rule that the States have a duty to protect unborn life.

This disposes of all issues in this case.

Consent

The respondent refused to consent to the filing of this brief.

Conclusion

The Constitution's universal guarantee of life to "any person" is America's most important legal right. The lives of tens of millions of children depend on their being permitted to present all relevant evidence and arguments to prove that this universal guarantee of life to "any person" does include the unborn.

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## INTEREST OF AMICUS

The amicus defends the right to life of the unborn, which the parties have not done.

## SUMMARY OF ARGUMENT

The Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn. States have a duty to protect the unborn.

## Argument

### I.

### THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN

The Declaration of Independence announced that reverence for life is America's founding principle. It said that all men are created equal, all are endowed by their Creator with an unalienable right to life, and the purpose of government is to protect the life of everyone.

America told the world that if we will follow our love of life wherever it may lead, then a future of more abundant life, which we can look forward to with hope, will unfold before us.

On the other hand, James Madison warned (Federalist Papers No. 10) that the primitive idea, that some can gain by harming others, had ruined all democracies known to history. And today, the lethal inventions of science have made reverence for life the only way to the future.

### 1. ON ITS FACE, THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" DOES INCLUDE THE UNBORN

This guarantee of life to everyone was incorporated into the Constitution. Its Fifth and Fourteenth Amendments guarantee that not "any person" can be deprived of "life ... without due process of law."

The words "any person" are universal, admit of no exceptions for anyone, make no distinction between born and unborn life, and on their face include the unborn, the same as everyone else. The obvious purpose of guaranteeing life universally to "any person" was to forbid making exceptions so some persons could be exterminated.

The Court admitted (Roe v. Wade, 410 U.S. at 156-157) that if the word "person" included the unborn, then Roe v. Wade "collapses," because the lives of the unborn would be "guaranteed" by the Constitution. In ruling "the word 'person'...does not include the unborn," the Court hit the Constitution head-on, and directly defied its express prohibition of extermination.

The words "any person" are the two most important words ever written into law because they protect the lives of everybody from extermination, and they summarize America's unique contribution to civilization. As Lincoln said, what made America great was the promise "that ALL should have an equal chance."

The words "any person" are the words which guarantee that equal chance to live to ALL; they stand as the supreme political achievement of the human race, the prize of milleniums of struggle. If the Constitution had stated it protected the life of "any person - except the unborn," then its words would support Roe v. Wade. But its words say "any person," without any exceptions.

In 1975, the Supreme Court of West Germany held that the words in its Constitution, "Everybody has the right to life," did include the unborn. It explained that the word "everybody" is universal.[1]

The U.S. Supreme Court ruled that the words "any person" included Chinese aliens,

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1. See case in R. Destro, Abortion and the Constitution, The Need For A Life Protective Amendment, 63 Cal. L. Rev. at 1341-51 (1975).



merely saying the words are "universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

But in Roe v. Wade, the Court ignored the letter of the law. Instead the Court focused on the isolated word "person," and ignored its modifier "any." Yet "any" is the word which means ALL, and extends the right to life to everyone without any exceptions.

By reading the universal guarantee of life to "any person" as if it were merely a guarantee to "some persons," the Court did the most forbidden thing and reduced the most important law in history to nothing.

The U.S. Constitution extends its guarantee of life to "any person." The letter of the law permits no exceptions. On their face the universal words "any person" do include the unborn.

## 2. THE SPIRIT OF THE LAW PROVES THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN

Roe v. Wade violates the spirit of the law, as well as its letter. The Court itself ruled that the Declaration of Independence is the spirit of the Fourteenth Amendment:

> The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life..." While such declaration of principles may not have the force of organic law ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the

spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than ... to secure the equality of rights which is the foundation of free government.
Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. at 159-160 (1896).

There is no real medical dispute that the unborn have been created.[2] Reading the letter of the Constitution, the guarantee of life to "any person," in the spirit that ALL are "created equal," and ALL shall get their chance to live, proves that the words "any person" do include the unborn.

3. HISTORY CONFIRMS THAT THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" INCLUDES THE UNBORN

The last time the Court implied an exception to the words "any person" was Dred Scott v. Sandford, 19 How. 393 (1857), where the Court ruled that the words "any person," as used in the Fifth Amendment, did not include Negroes; the phase "all men are created equal" did not include Negroes; there was a constitutional right to own a slave; Congress could not prohibit slavery in the territories; people were free to choose whether or not to own slaves; and Negroes could not sue in federal courts to see if they were slave or free.

Abraham Lincoln opposed the Dred Scott decision. If officials can say all men are created equal except Negroes, he asked, "where will it stop?" He said that Dred Scott was based on "falsehood." He alleged a conspiracy by the U.S. Supreme Court, two Presidents, and leading members of Congress

2. The uncontested medical evidence in the Texas brief in Roe v. Wade showed the fetal heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days"; and the unborn child is "alive."



to make slavery legal everywhere and overturn the U.S. Constitution.

Lincoln said he would not obey Dred Scott. He said the President swears an oath to obey the Constitution as he understands it, and not as it was understood by the Supreme Court. If the President were bound by Dred Scott, he said "the people will have ceased, to be their own rulers."

Dred Scott triggered a civil war. President Lincoln defied the Court's decision, that there was a constitutional right to own a slave, because he emancipated the slaves and declared them to be "forever free." He reminded us at Gettysburg that we were fighting to see whether a nation dedicated to the proposition that "all men are created equal" could long endure.

The Fourteenth Amendment was intended to rededicate America to its original proposition. One of its framers explained:

> "It establishes equality before the law, and it gives to the humblest ... the most despised ... the same protection before the law as it gives to the most powerful.... Without this ... there is no republican government."
> Rep. Jacob Howard, quoted in B. Schwartz, 1 Statutory History of the United States: Civil Rights 262 (1970).

The framers learned from Dred Scott. They said the Supreme Court must never again imply exceptions to the words "any person." They employed the universal words most suited for this purpose. And the people had already enacted criminal abortion laws to protect all stages of unborn life, showing the guarantee of life to "any person" means what it says.

Yet Roe v. Wade is another Dred Scott disaster. The Court rejected truth, reason and law. The Court assumes that, without one word of explanation, the framers

intended their promise of life to "any person" to sweep away all their abortion statutes and make the killings, which they said were criminal, into "liberty." The Court assumes the framers connived to repudiate a major point of the civil war, so judges would again be at liberty, as in Dred Scott, to convulse society by implying more exceptions to the words "any person." And the Court amends the Declaration of Independence to read "all men are created equal - except those created to be killed." The Court claims it can decree who was created to be killed.

The Court did the most forbidden thing. It defied the Constitution's guarantee of life to "any person," and decreed extermination to be legal.

The Constitution's letter, spirit, history, presumption in favor of life, and medical facts known to its framers, prove its guarantee of life to "any person" does include the unborn.

## II.

## ROE v. WADE IS VOID BECAUSE IT CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" AND CONDEMNED TO DEATH MILLIONS OF VICTIMS WHOM THE CONSTITUTION ENDEAVORS TO PRESERVE

### 1.

### ROE v. WADE CRIMINALLY DEFIED THE GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THE COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE PEOPLE HAD DEFINED TO BE "MURDER." THE COURT DECREED "MASS MURDER IS LIBERTY"

When Roe v. Wade was decided in 1973, an abortion was murder if the child was "born alive." A child could be "born alive" during second trimester abortions.

A physician explained to Congress that Roe v. Wade permitted second trimester hysterotomy abortions (basically Caesareans)



and children killed by this abortion can be "born alive"

> With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive.[3]

Throughout their history, Americans had defined such killings to be "murder." But in 1973 the Court decreed such killings to be "liberty." In effect, the Court decreed MASS MURDER IS LIBERTY.

### 1. THE COURT DECREED KILLINGS TO BE "LIBERTY" WHICH AMERICANS HAD CONDEMNED AS "MURDER" SINCE EARLIEST COLONIAL TIMES

America's first settlement at Jamestown followed the English common law, as did other colonies. The common law defined an abortion in which a "quick" (about 4 months gestation) child died after being "born alive" to be "murder."[4] Even if not yet viable, if the child was "born alive," the standard 17th century authority condemned the abortion as "so horrible an offense" and "this is murder."[5]

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3. Hearings on Constitutional Amendments on Abortion, before subcomm. on Civil and Constitutional Rights, of the House Comm. of the Judiciary, 94th Cong., 2d Sess., Ser. 46, Part 1, at 397 (1976). Most procedures can result in a child born alive.
There are about 140,000 second trimester abortions each year. Washington Post, April 26, 1985, A11.

4. Coke, 3 Inst. 50; Hawkins, 1 Hawkins Ch. 13, s. 16; Blackstone, 4 Bl. Com. 198.

5. Coke, 3 Inst. 50. Jefferson wrote, "This work is executed with so much learning and judgment, that I do not recollect that a single position in it has ever been judici-

The English writers cited this as the correct statement of the law.[6] And English courts followed this law.[7]

The English common law was the law of the land in colonial America. By allowing second trimester abortions in Roe v. Wade, the Court decreed killings to be "liberty" which Americans had defined to be "murder" since earliest colonial times.

## 2. THE COURT DECREED KILLINGS TO BE "LIBERTY" WHICH THE FRAMERS AND ADOPTERS OF THE FOURTEENTH AMENDMENT DEFINED TO BE "MURDER"

The English common law is the dictionary which American courts use to construe the state and federal homicide statutes.[8]

By the time the Fourteenth Amendment was adopted in 1868, American legal authorities and State supreme courts had long followed the common law rule that second trimester abortions were murder if the child were born alive. And viability was irrelevant. If death were caused by the

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ally denied....It may still be considered as the fundamental code of English law." 14 Writings of Thomas Jefferson 57 (1907). He served on the 1776 committee which adapted Virginia's laws to republican form, the common law being assigned to him.

6. 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865).

7. Regina v. West, 2 C & K 784 (1848).

8. Clarke v. State, 117 Ala. 1 (1898); Hamilton v. United States, 26 App. D.C. 382 (1905).



child being too immature to survive outside the womb, the abortion was murder.

An 1859 report by the American Medical Association stated the law of murder which existed throughout the United States:

> If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it into a situation in which it cannot live, is guilty of murder.[9]

This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.[10] This definition of murder was approved by the preeminent legal writers of the 19th century,[11] and it was adopted by State supreme courts.[12] It was

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9. Reported in A.S. Taylor, A Manual of Medical Jurisprudence 462 (6th ed. 1866). He described the AMA report as "a complete and comprehensive exhibit of laws of each of the United States." Id., at 460.

10. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, supra n. 9, at 462, 517 (1866).

11. F. Wharton, A Treatise on the Law of Homicide in the United States 93 (1855); Bishop, supra n. 10; Taylor, supra n. 9.

12. Clarke v. State, 117 Ala. 1 (1898); Watson v. State, 117 A 2d 549 (1955); Porter v. Lassiter, 87 S.E. 2d 100 (1955); State v. Anderson, 343 A 2d 505 (1975); People v. Chavez, 176 P. 2d 92 (1947).

still the law in 1973.[13] In 1975 the New Jersey courts applied this law of murder to an unviable fetus born alive:

> That a fetus may be the victim of murder if it be born alive has long been a part of our common law....Coke, Institutes 58 (1648).[14]

For almost four centuries governments came and went in America, but this law of murder endured as the law of the land. And it is binding on the U.S. Supreme Court.[15]

When it ruled in Roe v. Wade that States could not protect unborn life until viability - "about 7 months,"[16] the Court decreed killings to be "liberty" which the framers and adopters of the Fourteenth Amendment had defined to be "murder."

3. U.S. SUPREME COURT AND U.S. GOVERNMENT CLAIM POWER TO DECREE MASS MURDER OF JEWS, OR ANYONE, TO BE LIBERTY

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13. 2 L. Burdick, The Law of Crime 156 (1946); 1 Wharton's Criminal Law and Procedure 434 (12th ed. 1957); R. Perkins, Criminal Law 30 (2d ed 1969).

14. State v. Anderson, 343 A. 2d 505, 508 (1975), affirmed 413 A. 2d 611 (1980). The courts rejected the claim it was not murder because "the infants were never capable of maintaining a separate and independent existence." Id. at 615.

15. Chief Justice Marshall ruled that this Court must accept the construction given by a state to its own statute. Pollard v. Dwight, 4 Cranch 421, 429.

16. Roe v. Wade, supra, 160, 163.



Of course, if the U.S. Supreme Court can decree the mass murder of some persons to be liberty, it can decree the mass murder of anybody to be liberty.

Indeed, when the U.S. Supreme Court was accused of mass murder in the U.S. District Courts, the U.S. Government defended its Supreme Court by expressly claiming the Court must be obeyed even if it decreed the mass murder of Jews, or anyone else, to be liberty. An incredulous U.S. District Judge asked the U.S. Government:

> [U.S. District Judge]: Let me ask you to respond to this question. The plaintiff argues in his brief that the Supreme Court in Roe v. Wade took a discrete group of entities and said that these entities have no right to live, and thus may be killed ....And he said if you take Roe v. Wade and remove the word "fetus" and just substitute most any other word you want of another discrete group, that we wouldn't be here discussing this at all. Let's say that instead of "fetus," they said "Jews." That is the one he used in his brief.
>
> Would you argue stare decisis to me if, under Roe v. Wade, at the whim of neighbors Jews could be put to death?
>
> [U.S. Govt. Lawyer]: (I) would have to agree with the doctrine of stare decisis and advance it to the court.[17]

The U.S. District Judge adopted the U.S. Government's claim that he must obey

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17. Ernest v. U.S. Attorney for the Eastern District of Virginia and U.S. Attorney General, U.S. District Court in Richmond, Civ. No. 84-0858, transcript of proceedings at 21-22.

the U.S. Supreme Court even if it decreed mass murder to be liberty. And on review, not one single Justice had any objection to this ruling.[18]

And the Justices were accused of mass murder in a U.S. District Court on the grounds they had decreed mass murder to be liberty. Each Justice defended himself or herself by claiming all lower courts must obey the U.S. Supreme Court "no matter how misguided" its decrees may appear to be.[19]

Thus the U.S. Government, and its U.S. Supreme Court, claim the power to decree the mass murder of Jews, or anyone else, to be liberty.

## 4. THE U.S. SUPREME COURT HAS COMMITTED TREASON TO THE U.S. CONSTITUTION

Chief Justice John Marshall would have called Roe v. Wade "treason to the Constitution." In Marbury v. Madison, he wrote that the purpose of the Constitution was to control the government, including judges, and the intention of its framers is the law. Thus he ruled that the Court could not extend the Constitution "to objects not ... contemplated by its framers."[20] And Marshall warned that if the Court usurped such power, it would be "treason to the Constitution."[21]

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18. Ernest v. U.S. Attorney for the Eastern District of Virginia, and U.S. Attorney General, cert. denied 475 U.S. 1084 (1986).

19. Ernest v. Rehnquist, Stevens, Breyer, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, etc., U.S. Attorney, etc., U.S. Attorney General, et al, U.S. District Court in Alexandria, Civil No. 89-732-A. Defendants' Motion to Dismiss, page 3.

20. Ogden v. Saunders, 12 Wheat. at 332.

21. Cohens v. Virginia, 6 Wheat. at 404.



The officials to be controlled are not free to invent a constitution more to their liking. Lawless officials can overthrow a constitution as surely as armed rebels. Indeed, President George Washington warned that "usurpation" was "the customary weapon by which free governments are destroyed."

By defining killings to be "liberty" which the framers had defined to be "murder," the Court exactly extended the Constitution to objects not contemplated by its framers. The Court confronts the nation with the boldest and plainest case of officials committing "treason to the Constitution" which it could encounter.

By merely changing the names of the victims being killed, the U.S. Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany, who decreed the killing of Jews to be legal.[22]

At Nuremberg, the United States prosecuted Nazi judges, who obeyed the decrees of their "supreme judge," for complicity in extermination and murder. And the Nuremberg Tribunal convicted them.

Now the key doctrines of the Nazi legal system have been adopted by the U.S. Government: supreme judges who claim power to decree the mass murder of Jews, or any-

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22. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011-1014 (1951). Hitler claimed the emergency provisions of the Weimar Constitution gave him power to act as "the supreme judge." As such he decreed the killing of Jews to be legal. The Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted "within the authority" of the "decrees" of "the supreme judge." Id. at 983-85. But the Tribunal rejected that defense, "The dagger of the assassin was concealed beneath the robe of the jurist." Id., at 985.

one else, to be legal; and officials who claim they must obey such decrees.

When officials conspire to impose Nazi doctrines on the United States, which the United States itself condemned as extermination and murder at Nuremberg, no honest person can doubt that these officials have committed treason to the U.S. Constitution.

Now the lives of all Americans depend on official whim, as in Hitler's Germany.

The Court claims it must be obeyed even when it imposes Nazi doctrines on America.[23] In effect, the Court claims TREASON IS LAW.

## 5. UNITED STATES RULED BY GIANT CONSPIRACY TO MASS MURDER IS MOST CATASTROPHIC CRIME IN THE HISTORY OF CIVILIZATION

America introduced civilization to the idea that reverence for life is the future for the world. Yet America is now ruled by the most corrupt decree which the human mind can even imagine - MASS MURDER IS LIBERTY. The government of the United States knows how to build and use atomic bombs, but it does not know the difference between mass murder and liberty. This is the vision which America now holds out to guide the future of the world. Now we all descend into a terrifying darkness.

## 2.
## ROE v. WADE CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THE COURT DEFIED THE RULINGS OF JOHN MARSHALL AND USED A "GUILTY UNTIL PROVEN INNOCENT" BURDEN OF PROOF TO INFER THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN.

The Court used the correct burden of proof when it previously construed "any

23. See note 19, supra.



person."[24] Yet the Court actually reversed the burden of proof for the unborn.

Chief Justice John Marshall told the Court what it must prove in order to imply an exception to express and universal terms in the U.S. Constitution.

As already described, the words "any person" are express and universal, and on their face include the unborn, the same as everybody else. In order to imply an exception to exclude the unborn, so they can be killed with impunity from criminal laws, the Court must prove that including the unborn within the terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[25]

And the Court must prove that if the right to life of the unborn had "been suggested [to the framers] the language would have been so varied, as to exclude it."[26] The Court must prove that the

24. The Court ruled the words "any person" included Chinese aliens ("subjects of the emperor of China") merely saying the words are "universal." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). And the Court was so sure that the words "any person" included "corporations," it refused to allow counsel to argue against it. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886).

25. Sturges v. Crowninshield, 4 Wheat. 122, 202-203 (1819). When the Constitution uses universal words, and a case is "within the very words of the Constitution," the Court may not infer an exception unless the "absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

26. Dartmouth College v. Woodward, 4 Wheat. 518, 644-45 (1819). When the

framers would have changed the Fourteenth Amendment to read: "Nor shall any State deprive any person, except unborn persons, of life without due process of law."

These are the burdens which protect the lives of all Americans from government sanctioned extermination, as happened in Nazi Germany. The Court bears the heaviest burden of proof to imply an exception to the Constitution's guarantee of life to "any person" so millions of victims can be killed with impunity from criminal laws.

Chief Justice Marshall's rules prove that the Constitution's guarantee of life to "any person" does include the unborn because "all mankind" would not unite "without hesitation" to exclude them. And the framers of the Fourteenth Amendment would not have changed its guarantee of life to read "any person - except the unborn." The people had already enacted criminal statutes to protect the lives of the unborn throughout gestation. Thus the Constitution's universal guarantee of life to "any person" does include the unborn.

The Court exactly reversed the burdens of proof described by Chief Justice John Marshall. The Court said that the evidence did not prove "with any assurance"[27] that

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Constitution uses universal words, "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception."

27. Roe v. Wade, 410 U.S. at 157. "Assurance" means: "To make certain and put beyond doubt." Black's Law Dictionary (4th ed. 1968).



the guarantee of life to "any person" included the unborn. Thus the Court assumed that the words "any person" did not include the unborn, and placed the burden on the unborn to prove with "assurance" that the words "any person" did include the unborn.

When courts use this burden of proof to condemn tens of millions of victims to death, Americans can not pretend they still have a government of Constitution and laws.

The Court claims it can use this burden of proof to decree the extermination of anyone to be liberty.[28]

3.

## ROE v. WADE CRIMINALLY DEFIED THE U.S. CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THE COURT USED CRIMINAL PROCEDURES TO CONCLUDE THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN

Roe v. Wade was a mock trial designed to exclude truth.[29]

And the Court maintains its killings with mock trials. It refuses to allow counsel to represent the unborn and defend their right to life. It refuses to allow its false evidence in Roe v. Wade, which it used to infer that the words "any person" did not include the unborn, to be cross-examined. It refuses to allow evidence to be presented to show the Constitution's guarantee of life to "any person" does include the unborn.

The Nuremberg Tribunal cited such procedures as evidence to convict the Nazi judges of complicity in extermination and

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28. See n. 19, supra.

29. The MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed herein, details the Court's procedures with citations.

murder. It said, "Such a mock trial is not a judicial proceeding but a murder."[30]

The Court claims that it can use such mock trials to decree the extermination of anyone to be liberty.[31]

4.

## ROE v. WADE CRIMINALLY DEFIED THE CONSTITUTION'S GUARANTEE OF LIFE TO "ANY PERSON" BECAUSE THE COURT FABRICATED FALSE EVIDENCE TO CONCLUDE THAT THE WORDS "ANY PERSON" DO NOT INCLUDE THE UNBORN

The history of the criminal abortion statutes proves that the framers of the Fourteenth Amendment did not intend its guarantee of life to "any person" to exclude the unborn.

When the Amendment was adopted in 1868, over three-fourths of the ratifying States had already enacted statutes which made abortion at any stage of gestation a crime.[32] Within a few years, these criminal statutes were universal.

The ancient common law supposed that life commenced at "quickening" - when the mother felt the child stir in her womb. But judicial revision makes it impossible for the Court to assert with assurance that the common law in 1868 was any different than the abortion statutes supplanting it:

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30. United States v. Altstoetter, supra, at 1164 (1951). "The accused ... were denied the right to introduce evidence, to be confronted by witnesses against them.... They were ... denied the right of counsel of their own choice." Id., at 1046-47.

31. See note 19, supra.

32. The statutes are set out in Quay, Justifiable Abortion, Medical and Legal Foundations, 49 Geo. L. J. 447-520 (1961).



> By the ancient common law ... as the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of gestation.[33]

By 1868, science had long rejected the ancient notion that life commenced at "quickening." The abortion statutes reflected the views of science that there was no time during gestation when the unborn were not alive.

In view of this history, the Court cannot meet its heavy burden to prove that the framers intended to exclude the unborn from the Fourteenth Amendment's guarantee

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33. Lamb v. State, 67 Md. 524 (1887). Some state supreme courts ruled that the common law made abortion at any stage of gestation a crime. Mills v. Comm., 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885).

And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

of life to "any person," so they could be killed for convenience. This evidence is fatal to Roe v. Wade.

Thus the Court needed to rewrite 19th century medicine and law. The Court fabricated the hypothesis that the 19th century abortion statutes were intended to protect only the mothers, not the unborn. This suggested that the American people never intended the lives of the unborn to be protected by law. This hypothesis was fabricated as follows.

A.

The Court first asserted as fact, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148. The Court claimed that abortions, even by physicians, were hazardous to the woman.

The only authority the Court cited to prove its assertion was a 20th century medical history book.[34] But this book only described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The abortion operation was not mentioned anywhere in the entire book.

The 19th century obstetric authorities throughout the Western world prove that abortions by physicians were "perfectly safe" to the woman.[35] The Court did not

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34. Haagensen and Lloyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n.43.

35. 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802). He was a standard English authority. A French physician wrote "experience has proved that the dangers of the operation are reduced to a small matter." A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th Am. ed. 1852). The preeminent American physician wrote "to the mother there is



examine even one of these obstetric textbooks. They prove the Court's assertion, "the procedure was a hazardous one for the woman," to be false.

The Court never revealed the hazardous abortion procedure to which it was referring. Actually, the 19th century physicians generally used the ancient method,[36] which one physician traced back 2000 years,[37] and which they described as "perfectly safe" to the woman.

Since abortions by physicians were not hazardous to the mother, the only motivating purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortions. Had it been the purpose of the legislators to only protect the mother, they would have simply required abortions to be performed by physicians.

B.

The Court next asserted as fact, "Abortion mortality was high."[38] The Court cited no authority to support it.

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very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864).

36. Dr. Denman, a standard authority in England, wrote in 1802: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb, which was "perfectly safe" to the woman. 2 Denman, supra, at 96-99.

37. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

38. Roe v. Wade, 410 U.S. at 149.

The Court intended this assertion to prove that physicians were killing so many women with abortions that women needed legislation to protect them from the medical profession.

The 19th century obstetric authorities prove this assertion to be false. The obstetric texts show that abortions by physicians were "perfectly safe" to women.

C.

The Court next asserted:

> "[A] State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149.

This is a false inference, drawn from two false assertions of fact.

The evidence shows these abortions statutes were intended to protect the unborn. The 19th century treatises on criminal law stated that the foetus was "a living being immediately after conception" and these abortion statutes were intended to protect the lives of the unborn during all stages of gestation.[39] And State supreme courts ruled that these abortion statutes protected the unborn.[40] And authors of the statutes said their purpose was to protect the unborn.[41]

But since abortions by physicians were known all over the western world to be safe to women, the motivating purpose of these

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39. 1 F. Wharton, A Treatise on the Criminal Law of the United States 656-57 (5th ed. 1861).

40. Smith v. State, 33 Me 48 (1851).

41. See Joynes quote, page 24, infra.



abortion statutes could only have been to protect the lives of unborn children from destruction from abortions. Since legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals,[42] it proves that their motivating concern was to protect unborn life.

D.

The Court then concluded, "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court could not find even one 19th century authority to support this result.

In view of these abortion statutes, the Court cannot prove that the people who framed and adopted the Fourteenth Amendment intended its guarantee of life to "any person" to exclude the unborn, so they could be killed for convenience.

E.

The Court resurrected the ancient view that life commenced at "quickening" (about four months gestation) and arbitrarily expanded that to "viability" (about seven months gestation). Yet, by the time the Fourteenth Amendment was adopted, both science and law had rejected the ancient view.

A physician, who helped draft Virginia's 1848 state abortion statute, explained that science had rejected the ancient view that life began at quickening:

> (T)hat the embryo is endowed with an

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42. "In thirty-four cases of criminal abortion ... twenty-two were followed...by death, and only twelve were not. In fifteen cases necessarily induced by physicians, not one was fatal." H.R. Storer, M.D., On Criminal Abortion in America 43 (1860).

inherent vitality from the first moment of conception, and is therefore as much entitled to the protection of the law before the period of "quickening" as after it, every well-informed physician must yield a ready assent. The old doctrine, once held by medical men ... that the foetus first becomes animated, or endowed with distinct vitality, at the moment when the sensation of quickening is experienced by the mother, has been long since banished from the domain of science ... and now only finds a retreat in the dark and ancient caverns of the common law.

....

(T)he civil rights of the unborn child are perfect from the very commencement of its being.

L.S. Joynes, M.D., "Foetus in Utero," Virginia Medical Journal 179-180, 187 (1856).

In 1860 the President of the American Medical Association condemned that ancient view as a "barbarous physiology" and urged the States to enact statutes to protect all stages of unborn life:

> "This relic of a barbarous physiology needs to be exploded, and the truth should be generally promulgated, that, from the moment of conception, a new being is engendered." 13 Transaction of American Medical Association 56-7 (1860)

And America's eminent professor of obstetric medicine wrote in 1860:

> From the moment of fecundation, the new being becomes independent ... its individuality is complete.... (T)here is a progressive ... advancing from one degree of perfection to another. Every protection, therefore, which is extended by human legislation to the young infant ... should be equally effectual in securing the life of the embryo from the earliest period of its existence.[43]



But the Court adopted a view of unborn life which 19th century medical science had rejected as "a barbarous physiology," which courts had ruled "never ought to have been the law anywhere," [44] and which legislatures had condemned as criminal.

In construing the phrase in its constitution, "Everybody has the right to life," the Supreme Court of West Germany ruled the word "everybody" did include the unborn and the State had a duty to protect unborn life:

> "No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life." (supra n. 1)

The medical and legal history show the framers and adopters of the Fourteenth Amendment made this same conclusion when they guaranteed life to "any person" without any exceptions for the unborn. They decided that unborn life was a progressive advancing from one degree of perfection to another, and there was no time when the unborn were not alive and the law could withdraw its protection of life.

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43. H.L. Hodge, M.D., The Principles and Practice of Obstetrics 78 (1864). Hodge's "name had become a household word throughout the land" and his book "valued among the very first works on obstetrics ever issued from the American or foreign press." R. Penrose, M.D., Discourse on Life of H.L. Hodge 20-21 (1872)

44. Mills v. Comm., 13 Pa. at 632 (1850).

Chief Justice Marshall ruled that the intention of the framers is the law, and for the Court to disobey it would be treason. So the Constitution's guarantee of life to "any person" includes the unborn.

The Court claims it can fabricate evidence to exclude anyone from the U.S. Constitution's guarantee of life to "any person."[45] In effect, the Court claims FALSEHOOD IS TRUTH.

5.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF MASS MURDER AND EXTERMINATION

For the 113th time, the U.S. Supreme Court is accused of defying the Constitution's guarantee of life to "any person" and exterminating millions of victims whom the Constitution endeavors to preserve.

For the 89th time, the U.S. Supreme Court is accused of mass murder in violation of state and federal statutes.

For the 93rd time, the U.S. Supreme Court is accused of using criminal procedures to effect and maintain its Roe v. Wade killings.

But, for two decades, the Court never attempted to refute the charges.

Failure to deny a charge is admissible as a confession that the charge is true.[46] As Socrates cross-examined 2400 years ago:

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45. See note 19, supra.

46. 4 Wigmore, Evidence, § 1071-1073 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick on Evidence, § 161 (1972).



> "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?"

And the Court recognizes this ancient rule:

> "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. at 319 (1976).

Under the Court's own rulings, its silence is an admission that the charges are true:

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that the Court's silence is a confession that the charges are true.

First, the evidence proves the charges to be true. The Court decreed killings to be "liberty" which States had defined to be "murder." This is mere historical fact. No denial is possible. As Chief Justice John Marshall said, "a fact which has existed cannot be made never to have existed.[47]

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. Chief Justice John Marshall ruled that judges who "close their eyes on the Constitution" and "condemn to death those victims whom the Constitution

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47. Marbury v. Madison, 1 Cranch 137, 167 (1803).

endeavors to preserve" commit "crime."[48] The Court had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided, and to obey the evidence.

Third, the Court's steadfast silence for two decades in the face of scores of accusations is unparalleled in the legal history of the world. The Court itself cited this circumstance as making confession by silence more trustworthy:

> "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

Fourth, the evidence showed the United States was being ruled by a giant conspiracy to exterminate and mass murder, to overthrow the U.S. Constitution, and to impose Nazi doctrines on America. Never in history had it ever been more imperative to deny charges if they were untrue.

And fifth, the Justices met the charges by claiming they must be obeyed even if they decreed the mass murder of Jews, or anyone else, to be liberty.[49]

A government of laws can permit only one conclusion to be drawn from these facts: the U.S. Supreme Court confessed in court that the charges are true.

If Roe v. Wade is a mistake of law, then all government officials, news media persons and public advocates who help to support it can be prosecuted for complicity in mass murder and extermination.

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48. Marbury v. Madison, 1 Cranch 137, 179-180 (1803).

49. See note 19, supra.



The general rule is that mistake of law is no excuse for breaking the law.[50] The limited affirmative defense of reasonable reliance on an official judicial opinion, thereafter determined to be a mistake of law, does not apply in homicide cases, much less national extermination.[51] And even if it did, no reliance on Roe v. Wade could be reasonable in view of the above facts. So the law applied at Nuremberg applies here. Obedience to decrees of the supreme judge is no defense to complicity in extermination and mass murder.

Even if the U.S. Supreme Court held a gun to a man's head, and threatened death unless he obeyed Roe v. Wade, it would not be a defense to homicide. The law says "he ought rather to die himself than escape by the murder of an innocent."[52]

In explaining why Western democracies bowed to violence and Nazis got away with monstrous crimes, Winston Churchill quoted Machiavelli: "Men avenge slight injuries, but not grave ones." Thus America is now ruled by a giant conspiracy to mass murder.

"Political language," wrote George Orwell, "is designed to make lies sound truthful and murder respectable." In his novel "1984," Orwell described a tyranny which claimed "Whatever the Party holds to be truth is truth," and defrauded its subjects into obedience with its slogans

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50. R. Perkins, Criminal Law 920 (2d ed. 1969). Oliver Wendell Holmes, The Common Law 41 (1963). The Constitution's ex post facto provisions do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

51. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

52. 4 Bl. Com. 30.

"FREEDOM IS SLAVERY" and "WAR IS PEACE." This science fiction may appear implausible, yet for two decades the United States has been ruled by a Court which claims, "Whatever the Court holds to be truth is truth," and maintains obedience with its slogans - MASS MURDER IS LIBERTY, FALSEHOOD IS TRUTH, and TREASON IS LAW.

But all that will be swept away. The primitive idea, that some can gain by killing others, has no future. The message of our Declaration of Independence becomes more true every day - reverence for life is the only path to the future. Wherever we are, wherever in the universe our kind may go, our essential thought, the thought necessary for us to exist, will always be reverence for life.

## CONCLUSION

Merely overruling Roe v. Wade will not remedy the wrong. The Court misguided this nation and the entire world.

Now the Court must speak the truth. The Constitution's guarantee of life to "any person," made in its Fifth and Fourteenth Amendments, does include the unborn. State and federal governments have a duty to protect unborn life.

_____

Alan Ernest
Counsel

Supreme Court, U.S.
FILED
JUN 5 1996
CLERK

(11)

No. 95-1065

IN THE
# *Supreme Court of the United States*
*OCTOBER TERM, 1995*

**REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,**
*Petitioners,*

v.

**PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.,**
*Respondents.*

On Writ of Certiorari To The
United States Court of Appeals
For The Second Circuit

## AMICUS BRIEF OF LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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No. 95-1065

IN THE

# *Supreme Court of the United States*

*OCTOBER TERM, 1995*

**REVEREND PAUL SCHENCK**
**and DWIGHT SAUNDERS,**
*Petitioners,*

v.

**PRO-CHOICE NETWORK OF**
**WESTERN NEW YORK, ET AL.,**
*Respondents.*

On Writ of Certiorari To The
United States Court of Appeals
For The Second Circuit

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## INTEREST OF AMICUS[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. Liberty Counsel's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms -- especially as related to use of traditional public fora for discussion of controversies impacting society. As part of advancing Liberty Counsel's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel files this brief in support of the Petitioners to assist this Court in rendering a reasoned decision regarding the *Madsen* test. Attorney Mathew D. Staver was lead counsel in the *Madsen* case and having argued that case before this Court herein attempts to lend his assistance in the proper application of *Madsen* to the facts within the record.

## SUMMARY OF ARGUMENT

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court created a new test to distinguish between injunctions and ordinances. Under the new *Madsen* test, this Court determined that a content-neutral injunction must "burden no more speech than necessary to serve a

[1] This brief is filed with permission of all the parties. The letters granting consent of the parties are attached hereto with the filing of this brief.



significant government interest." *Id.* at 2525. *Madsen* created a new four-part test to analyze speech-restrictive injunctions. The Second Circuit's en banc decision fails to satisfy the four-part test created by the *Madsen* Court.

Even assuming, *arguendo*, the court correctly followed the new *Madsen* test in creating the speech-restrictive injunction, under the *Madsen* test an injunction which burdens more speech than necessary is unconstitutional. In *Madsen*, this Court explained that the phrase "burden no more speech than necessary to serve a significant government interest" was equivalent to the "precision of regulation" standard utilized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910-11 (1982), and the *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968), standard which requires an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective." *Madsen*, 114 S. Ct. at 2526. The speech-restrictive 15-foot floating zones and the "cease and desist" provision both fail the "precision of regulation" and "pin-pointed objective" standards reaffirmed by *Madsen*.

The *Madsen* test applies only to injunctions which are neither prior restraints nor content-based restrictions. Petitioners assert that the challenged provisions are both content and/or viewpoint-based and act as a prior restraint on free speech rights. If this Court determines the challenged provisions are content or viewpoint-based, the *Madsen* test is inapplicable, but the provisions are then subject to the "most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988). If this Court determines the challenged provisions are content or viewpoint-based, then those provisions also act as a prior restraint on free speech in traditional public fora. The injunction in *Carroll* was content-neutral, but was analyzed as a prior restraint. *Carroll*, 393 U.S. at 181. Therefore, under

any appropriately applied analysis, the challenged provisions must fail because they either "burden more speech than necessary" or they fail to meet strict scrutiny.

## ARGUMENT

### I.
### THE SPEECH-RESTRICTIVE INJUNCTION IS UNCONSTITUTIONAL BECAUSE IT FAILS THE *MADSEN* TEST.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court created a new test to distinguish between injunctions and ordinances. In creating this new standard, this Court held that "when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 2525. As stated by this Court, the *Madsen* test applies only to injunctions which are neither prior restraints nor content-based restrictions. Requiring that regulations on free speech be "narrow and precise", this Court noted:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. . . . [I]n other words, the order must be tailored as precisely as possible to the exact needs of the case.

*Id.* at 2526 (quoting *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968)).



This Court held in *Madsen* that speech-restrictive injunctions warrant more rigorous scrutiny because unlike legislative enactments they are ready tools for censorship. *Madsen*, 114 S. Ct. at 2524. Noting that injunctions mostly target specific persons or groups, are issued by a single judge and often carry stiffer penalties for violation of the terms, this Court held that such "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do generally applicable ordinances." *Id.*; *cf. United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552, 2563 (1994) ("[w]here a single judge, rather than a legislature, declares a particular sanction . . . such deference is less appropriate") (citing *Madsen*, 114 S. Ct. at 2516).

*Madsen* began its inquiry into the new test by stating that under general equity principles, injunctive relief affecting speech is permissible only upon a showing that: (1) the defendant has violated, or imminently will violate, some provision of statutory or common law;[2] (2) there is a cognizable danger of recurrent violation;[3] (3) a non-speech-restrictive injunction preventing the repeated illegal conduct has proven ineffective to protect the significant government interests because the defendant has repeatedly violated the injunction;[4] and (4) a subsequent speech-restrictive injunction may not burden more speech than necessary to serve a significant government interest.[5]

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[2] *Madsen*, 114 S. Ct. at 2524 n.3 (quoting *United States v. W. T. Grant Company*, 345 U.S. 629, 633 (1953)).

[3] *Id.*

[4] *Id.* at 2526-27.

[5] *Id.* at 2525-26; *see* Mathew D. Staver, *Injunctive Relief and the Madsen Test*, 14:2 ST. LOUIS U.PUB.L.REV. 456-494 (1995).

The first two prongs of the above test are applicable to any injunction because injunctive relief is an equitable remedy.[6] Thus, prongs one and two must be met before the entry of any injunction. After prongs one and two are met, a court must attempt to restore law and order by a non-speech-restrictive injunction, and only after that injunction proves to be ineffective may a subsequent speech-restrictive injunction be issued. Yet, even the speech-restrictive injunction may not burden more speech than necessary to serve a significant government interest. *See id.* at 2525-26.

The interest identified in *Madsen* was maintaining physical access to the clinic. Because this Court concluded that the first (the non-speech-restrictive) injunction was inadequate to protect access, and concluded that the named defendants repeatedly violated the first injunction, this Court was willing to uphold certain speech-restrictive portions of the second (speech-restrictive) injunction. Consequently, the second injunction, known in the *Madsen* case as the amended permanent injunction, was literally four steps removed from illegal activity.[7] In this case, the Second Circuit's en banc decision fails to satisfy the four-part test created by the *Madsen* Court.[8]

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[6] *Madsen*, 114 S. Ct. at 2524 n.3.

[7] *Madsen* cited *National Society of Professional Engrs. v. United States*, 435 U.S. 679, 697-98 (1978), for the proposition that an injunction may restrict what would normally be protected expressive activities when in the context of that restriction the violator is known to have repeatedly engaged in illegal conduct. *Madsen*, 114 S. Ct. at 2527.

[8] The Second Circuit en banc in *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (en banc), though not articulating *Madsen* as a four-part test, analyzed the injunction utilizing this format and found the 15-foot buffer zone and "cease and desist" provisions



**A. There Was No Violation Or Threatened Violation Of Statutory Or Common Law.**

As this Court instructed in *Madsen*, before instituting any injunction the court must first determine that the person or entity being enjoined has violated or imminently will violate some statutory or common law. *Madsen*, 114 S. Ct. at 2524 n.3. In this case, the District Court granted the TRO and the preliminary injunction prior to the development of the *Madsen* test. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992). Following the reasoning in *Madsen*, the initial question is what statutory or common law was threatened which might warrant an injunction.

It is undisputed that Petitioners agreed to a voluntary injunction prohibiting "rescues" or "blockades" of the clinics. "Prior to the preliminary injunction hearing, defendants stipulated that the physical 'blockade' type of 'rescue' demonstration may be enjoined." *Pro-Choice Network*, 799 F. Supp. at 1424 n.5. Because all the parties agreed that no "blockades" of a clinic would ever occur, the government's interest in protecting access and assuring that the right to abortion was not infringed was satisfied. No possible violation of any "statutory or common law" could occur. In fact, the record reveals that the District Court specifically found that "there have been no physical 'blockades' since the Court issued the TRO." *Id.* at 1424 n.5. Although the TRO might have been warranted to protect access on September 28, 1990, following the teaching of *Madsen*, the preliminary injunction provisions challenged herein were not needed for two reasons: (1) there was no cognizable danger of recurrent

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to be constitutional under the heightened scrutiny demanded by *Madsen*. *Pro-Choice Network*, 67 F.3d at 395.

violations; and (2) the TRO and preliminary injunction *began* with speech-restrictive provisions without first determining whether less speech-restrictive provisions could protect access to the clinics. The true error in this case is the use of a federal court's judicial power to silence speech which some might find "stressful."

In misinterpreting the *Madsen* test and ignoring the clear record, the Second Circuit en banc decision cited what it believed were two techniques used by pro-life demonstrators to prevent individuals from entering or exiting abortion clinics. First, it found that the demonstrator's activities amounted to a "constructive blockade" because the picketing outside the clinics caused persons to feel "stress" while entering and exiting the facilities. *Pro-Choice Network*, 67 F.3d at 396. In the mind of the en banc court, the purpose of these "constructive blockades" was to intimidate individuals from attempting to utilize the abortion facility. *Id.* The second technique which the en banc court addressed was what it called "sidewalk counselling." In this technique, the pro-life demonstrators approached patients entering the clinic and offered them pro-life literature in an attempt to speak to them about the consequences of having an abortion. This, the court found, was also too intimidating to be permitted. In making their conclusions, both the District Court and the Second Circuit en banc found that the stress caused by pro-life activities sometimes caused women to forego their right to an abortion. The en banc panel concluded: "The timid have a right to go about their business, and it is no embarrassment for federal court to say so." *Id.*

Although protecting the "timid" might be a commendable avocation of some, asserting that the federal judiciary has the duty to protect us from speech which might upset us is contrary to this Court's long precedent. Quite to the contrary,



the First Amendment protects such speech -- even speech which some find offensive. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Stress induced by speech or other listener reaction caused by speech-related activity is not a legitimate basis for regulating activities protected by the First Amendment. *See Forsyth County v. The Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988). The excuse that someone has caused another person stress has never been used as proof that an individual has violated statutory or common law.

Even if actions amount to coercive activity, no statutory or common law is violated. If the First Amendment means anything, it means "free trade and the opportunity to persuade, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). The en banc decision held that speech activity which is coercive is not constitutionally protected. *Pro-Choice Network*, 67 F.3d at 395. However, as this Court stated in *Organization for a Better Austin v. Keefe*:

> The claim that expressions [are] intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.

402 U.S. 415, 419 (1971) (citations omitted). This Court took an even stronger stand in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910-11 (1982), declaring: "Speech does not lose its protective character, however, simply because it may embarrass others or coerce them into action." In reality, once the right of access to the clinic is guaranteed, there is no valid basis to institute a speech-restrictive injunction.

The fact that a demonstration causes stress in no way violates statutory or common law. Thus, there was no violation or threatened violation of statutory or common law. Therefore, the speech-restrictive provisions are unjustified.

### B. There Was No Cognizable Threat Of Continued Violation Of The Law.

The second element needed to justify the institution of an injunction is that there is a cognizable threat of continued violation of the law. *Madsen*, 114 S. Ct. at 2524 n.3. The only conceivable, cognizable threat of a legal violation is the blockading of access to the clinics. By the parties stipulation, the District Court instituted an injunction against physical blockades. At the time the preliminary injunction was entered, the pro-life picketers had never blocked or attempted to blockade any clinic since the entry of the TRO. Any threatened violation beyond this is simply a fallacious justification for the speech-restrictive injunction.

### C. A Non-Speech-Restrictive Injunction Designed To Prevent Violation Of The Law Was Not Attempted Prior To Entering The Speech-Restrictive Injunction.

Before issuing a speech-restrictive injunction, a court must establish the insufficiency of a non-speech-restrictive



injunction. In *Madsen*, this Court found that a speech-restrictive injunction was necessary because a non-speech-restrictive injunction had been repeatedly violated. *Madsen*, 114 S. Ct. at 2526-27. Like *Madsen*, in this case the significant government interest is to protect access to the clinics. The *Madsen* Court held that the "state court seems to have had few other options to protect access given the narrow confines around the clinic."[9] This Court assumed that the first injunction failed to protect access to the clinic and thus allowed more radical measures. The Court gave deference to the state court's familiarity with the factual background and concluded:

> We also bear in mind that the fact that the state court originally entered a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order.[10]

In *Madsen*, this Court clearly stated that it would uphold the speech-restrictive injunction only because the first injunction did not effectively protect access to the clinic. In this case, the District Court did not enter a finding that Petitioners had

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[9] *Madsen*, 114 S. Ct. at 2527. In upholding the portion of the 36-foot buffer zone at the clinic entrance and driveway, this Court focused on two factors: (1) an assumption that the protestors had violated a prior non-speech-restrictive injunction which was ineffective in maintaining free ingress and egress; and (2) the narrow confines of the clinic which included a strip of sidewalk approximately four-feet wide and 37-feet long that connected the two parking lots. *Id.* If the first factor was absent, this Court might not have upheld the 36-foot zone at the clinic entrance.

[10] *Id.*

engaged in a "rescue" or had actually "blocked access" to the clinic. Rather, the District Court actually found that:

> Prior to the preliminary injunction hearing, *defendants stipulated that the physical "blockade" type of "rescue" demonstration may be enjoined.* Thus, the evidence adduced at the preliminary injunction hearing centered on the *constructive* "blockade" type of demonstration and "sidewalk counseling." *Commendably, there have been no physical "blockades" since the Court issued the TRO.*[11]

The record clearly reveals that "there have been no physical 'blockades' since the Court issued the TRO." *Id.* As held in ***Madsen***, the interest is to protect access to the clinic. Although Respondents wish to direct this Court to past acts of "blockades" prior to the entry of the TRO or after entry of the preliminary injunction, at the time the preliminary injunction was issued the District Court's findings were clear -- the government interest in protecting access to the clinic was achieved. It is the record before the District Court at the time it entered the speech-restrictive preliminary injunction that is relevant to this Court's inquiry. Because the District Court's record at that time reveals there had been no "blockades" of the clinics, the speech-restrictive injunction was not warranted because access to the clinic was not thwarted.

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[11] *Pro-Choice Network*, 799 F. Supp. at 1424 n.5 (emphasis supplied). Because the ***Madsen*** test was established in 1994, after the District Court entered its ruling in 1992, the District Court did not have the benefit of this Court's guidance regarding analysis of content-neutral injunctions. However, both the Second Circuit panel and en banc decisions, which are the focus of the present controversy, were handed down after this Court decided the ***Madsen*** case and the facts in this case still center upon the record presented to the District Court for the 1992 decision.



The error of the District Court is understandable because it did not have the teaching of ***Madsen*** in 1992. Yet the Second Circuit's en banc decision, looking at the injunction in light of ***Madsen***, should have determined that granting a speech-restrictive injunction without evidence of the need for such a broadly sweeping prohibition on free speech cannot meet the new ***Madsen*** test. As is required by ***Madsen***, a court must first attempt to implement a less restrictive injunction. In this case, the speech-restrictive injunction was granted at the very beginning adding even more fuel to the fire of this controversy. Following the dictates of ***Madsen***, a court is required to attempt a less restrictive (non-speech-restrictive) injunction *before* ever granting the more speech-restrictive provisions -- the 15-foot floating buffer zones and the "cease and desist" provisions.[12] Had the District Court entered a less restrictive injunction, and then found that injunction failed to meet the asserted government interest -- clinic access -- a more restrictive injunction would be warranted.

Respondents wish to assert a "bootstrap" argument by claiming that portions of the original injunction were repeatedly violated following entry of the TRO thereby creating the need for further regulation -- *i.e.* the speech-restrictive injunction. First, Respondents contradict the clear record, because although First Amendment activities continued at or near the subject clinics, access to the clinics was never denied by any "rescue" or "blockade" after entry of the TRO. *See Pro-Choice Network*, 799 F. Supp. at 1424 n.5. Second, Respondents point to various violations of the two provisions challenged herein. Yet, violations of these overbroad and speech impinging provisions are more likely simply because they are so very vague ("floating 15-foot zones") and

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[12] The original TRO contains the provisions challenged herein -- the 15-foot floating buffer zones and the "cease and desist" provision.

overbroad ("cease and desist"). Third. any other acts claimed to have occurred subsequent to the entry of the preliminary injunction should not be considered by this Court because such acts were not considered by the District Court in making the findings supporting the preliminary injunction.

In *Madsen*, this Court upheld a speech-restrictive injunction only after finding that a narrower, non-speech-restrictive injunction failed to protect unfettered ingress to and egress from the clinic. *Id.* at 2527. In this case, there has been no such finding. Neither the Second Circuit en banc nor the District Court decision alleged that the pro-life demonstrators engaged in illegal conduct which was not remedied by the injunction against physical blockades. Nothing demonstrates that a non-speech-restrictive injunction would fail to protect unfettered ingress to and egress from a clinic. The District Court did not even make a determination that a non-speech-restrictive injunction would fail. The court simply announced that it perceived the existence of a problem and proceeded to banish the First Amendment as it applies to pro-life demonstrators.

For these reasons, the 15-foot bubble zone and "cease and desist" provisions violate the *Madsen* test because they substantially burden the Petitioners' right to free speech without establishing the need for such a speech-restrictive injunction and without showing the ineffectiveness of a non-speech-restrictive injunction.

### D. The Injunction Burdens More Speech Than Necessary.

Even assuming, *arguendo*, that the District Court correctly followed the *Madsen* test regarding proper procedure when entering the preliminary injunction, under the *Madsen*



test an injunction which burdens more speech than necessary is unconstitutional. *Madsen*, 114 S. Ct. at 2525. In adopting this new standard for content-neutral injunctions, the *Madsen* Court confirmed that this standard was similar to the "precision of regulation" demanded in *Claiborne Hardware*, 458 U.S. at 916, and the *Carroll* standard which requires an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective." *Carroll*, 393 U.S. at 183. This Court stated the requirement that the speech-restrictive injunction "burden no more speech than necessary to serve a significant government interest" was equivalent to the standard utilized in *Claiborne Hardware* and *Carroll*. *Madsen*, 114 S. Ct. at 2526.

The facts in *Claiborne Hardware* were more egregious than the facts in *Madsen*. In March 1966, several hundred African-Americans implemented a boycott in Claiborne County, Mississippi. This boycott included "acts of physical force and violence" including "[i]ntimidation, threats, social ostracism, vilification, and . . . the stationing of guards in the vicinity of white-owned businesses." *Claiborne Hardware*, 454 U.S. at 894-95. The Mississippi Supreme Court permanently enjoined the boycott but this Court reversed, finding that each element of the boycott was a protected form of speech. *Id.* at 907-08. "Precision of regulation" is demanded when "conduct occurs in the context of constitutionally protected activity." *Id.* at 916. This Court concluded that the injunction "must be dissolved" or "modified to restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924 n.67.

As in *Claiborne Hardware*, the injunction instituted by the District Court must be dissolved or modified to the extent it regulates lawful conduct. In *Madsen*, this Court held that "injunctive relief should be no more burdensome to the

defendants than necessary to provide complete relief to the plaintiffs." *Madsen*, 114 S. Ct. at 2525 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). "A state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell v. Connecticut*, 310 U.S. 900, 905 (1940). This Court laid out the principle for this policy in *New York Times Co. v. Sullivan*, 376 U.S. 254, 720-21 (1963):

> Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risk to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination. . . ."

Government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *see also City of Houston v. Hill*, 482 U.S. 451, 464-67 (1987) (requiring that regulations on free speech be "narrow and precise").

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved" . . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.



*Carroll*, 393 U.S. at 183-84 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). A regulation "is not narrowly tailored if a less restrictive alternative is readily available." *Boos*, 485 U.S. at 329; *see also Wygant v. Jacksonville Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

Respondents cite *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), as justification for the 15-foot zones and "cease and desist" provision, claiming that unwilling targets have a First Amendment right to be left alone. However, the question is more appropriately phrased: "Do Respondents have a First Amendment right to freely access public fora for their speech while imposing a $10,000 fine and imprisonment upon persons for continuing to talk after Respondents say "shut up"? Like the provision struck down in *Madsen*, any "offensive" or "unwanted" speech could be construed as intimidating, inviting dispute and even stirring people to anger.[13] Thus, anyone could claim intimidation and raise the specter of the injunction granting Respondents a $10,000 windfall per offense.

The injunction creates a narrow exception which allows two individuals to enter the 15-foot zone for the purpose of "sidewalk counseling". Even the right to free speech under the "sidewalk counseling" provision is illusory because under the "cease and desist" provision the clinic has merely to send a pro-choice escort into the area of the pro-life speaker to utter the word, "stop," which silences the pro-lifer person's right to free speech. In effect, the injunction's "cease and desist" provision grants the clinic a government license to silence all speech within traditional public fora. The penalty

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[13] *See Johnson*, 491 U.S. at 408-09; *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

for a single violation is "civil damages of $10,000 per day for the first violation . . . and/or may subject them to criminal contempt proceedings . . . ." *Pro-Choice Network*, 799 F. Supp. at 1441. One reason this Court created the new *Madsen* test was because injunctions often carry stiffer penalties for violation of the terms. *Madsen*, 114 S. Ct. at 2524. Additionally, "each successive violation of [the injunction] shall subject the contemnor to a civil contempt fine *double* that of the previous fine and/or civil contempt proceedings . . . ." *Id.* (emphasis supplied). In just seven days, the fine of just one person could rise to over $640,000. Even more interesting is that the injunction awards "that any amount collected thereunder shall be paid to the [clinic] at which the violation occurred." *Id.* Thus, the fines are all payable to the clinic holding the license to silence the speech. Indeed, the clinics could stop performing abortions altogether and simply gather in the fines accumulated from those not withdrawing the required 15-feet in an expeditious manner.

Under the injunction, a person walking within 15-feet of an "unwilling listener" cannot discuss pro-life beliefs with another individual or distribute pro-life literature. In essence, the person must keep silent in order to avoid prosecution. The injunction has created numerous undeterminable and forever moving "no-speech zones" of silence punishable by the wrath of the court if the silence is broken. This general prohibition against free speech within traditional public fora is not narrowly tailored.[14] As such, this Court should not retract from the dictates of *Madsen* by allow speech-restrictive injunctions to be entered without stringently scrutinizing those injunctions which burden First Amendment rights.

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[14] *See Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *Howard Gault Co. v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988); *Town of Barrington v. Blake*, 568 A.2d 1015 (R.I. 1990).



### 1. The 15-foot floating speech free zones burden substantially more speech than necessary.

The injunction, provision (a), provides complete protection against "blocking, impeding, or obstructing access to, or egress from any [clinic]." *Pro-Choice Network*, 799 F. Supp. at 1440. The injunction will operate to fine and imprison any person actually thwarting anyone's right to an abortion. However, provision (b) of the injunction goes on to create 15-foot bubble zones around the front of doorways, parking lot entrances or any person or vehicle seeking access to an abortion clinic. The 15-foot zones burden more speech than necessary to guarantee the right of access to the clinic and their need to protect access has not been established. An injunction which burdens speech without first establishing the insufficiency of a non-speech-restrictive injunction is unconstitutional. *Madsen*, 114 S. Ct. at 2427.

The 15-foot bubble zones forbid speech even when the speech-related conduct in no way obstructs or impedes access to the abortion clinic. As the Second Circuit panel noted, "the bubble zone provision prohibits a defendant from standing on a sidewalk near the clinic, within 15-feet of anyone seeking ingress to or egress from the clinic, holding a sign imprinted with an anti-abortion message." *Pro-Choice Network of Western New York v. Project Rescue of Western New York*, 67 F.3d 359, 370 (2d Cir. 1994). The provision does allow an exception permitting two people to enter the zone to converse with others. However, as soon as any person, even a clinic escort, objects to the pro-life speaker's message by implementing the "cease and desist" section in provision (c), the speaker must assume complete silence and withdraw at least 15-feet. Thus, like the unconstitutional "no approach" zone in *Madsen*, the injunction still leaves the power of censorship in the hands of the listener.

This Court noted that as "a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedom protected by the First Amendment." If this Court's teaching means anything at all, freedom of speech carries a preferred position under the Constitution. *See Kovacs v. Cooper*, 336 U.S. 77, 95 (1949). This "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times Co.*, 376 U.S. at 721 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)). As discussed, *infra*, by placing control over speech with the listener the District Court abandoned these principles for a new policy designed to silence unpopular views. Provision (a) is fully able to protect the asserted government interest -- access to the clinic. Provision (b) does not serve to protect any interest which is not already protected and therefore is not necessary to serve any government interest. *Johnson*, 491 U.S. at 410, 412 n.8. The court simply failed to justify the need for the 15-foot bubble zone provision. This provision burdens more speech than necessary to protect access to the clinic. *Madsen*, 114 S. Ct. at 2525. Thus, the provision is unconstitutional.

**2. The "cease and desist" provision burdens substantially more speech than necessary.**

The "cease and desist" provision is unconstitutional because, like the 15-foot bubble zone provision, the need for this speech-restrictive provision was not established. The "cease and desist" provision is indistinguishable from the 300-foot "no approach zone" struck down in *Madsen*. *Madsen*, 114 S. Ct. at 2529. Within 300-feet of the clinic, a pro-life person could not distribute literature or speak with any individual unless a person indicated a desire to communicate. *Id.* This Court held that it would not justify a prohibition on



*all* uninvited approaches of persons "regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.*

This Court struck down the 300-foot "no approach zone" for the same reason it should now strike down the "cease and desist" provision -- any other conclusion will result in the abolishment of the public forum doctrine. The founding fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . . Believing the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 374-75 (1929) (Brandeis, J., concurring). Reverence for free speech is nowhere more important than in quintessential public fora which from time immemorial have been open for public debate. It is undisputed that the injunction affects traditional public fora -- specifically the public streets and sidewalks surrounding the clinics. *Frisby*, 487 U.S. at 479; *ISKCON v. Lee*, 112 S. Ct. 2711, 2716-17 (1992) (Kennedy, J., concurring); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

In an attempt to weave its way around this blatant violation of the well settled public forum doctrine, the court applied the "captive audience" doctrine. *Pro-Choice Network*, 799 F. Supp. at 1435-38. The "captive audience" doctrine stands for the principle that in certain situations a listener has a right not to be exposed to an unwanted message. *See Rowan*, 397 U.S. at 738. The court held that individuals attempting to enter or leave the clinic are a "captive audience" of the pro-lifer speaker. *Pro-Choice Network*, 799 F. Supp. at 1436.

The "captive audience" doctrine does not apply in this situation. In each of the cases cited by the District Court to justify its speech-restrictive injunction, the site where the speech took place was a non-traditional public forum or the speech was projected so broadly (by sound trucks) that it could not be escaped by leaving the public forum. In this case, the speech is taking place in traditional public fora -- including a public sidewalk. *See Perry Educ. Ass'n*, 460 U.S. at 45; *Boos*, 485 U.S. at 318. The "captive audience" doctrine does not apply in traditional public fora. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975); *Cohen v. California*, 403 U.S. 15, 21 (1971). Any individual seeking ingress to or egress from the clinic, as well as any pro-choice escort working for the clinic, can roam freely without regard to any boundaries and censor pro-life speakers at will merely by approaching and whispering the word "stop."

It is not the clinic entrants who are captive in this case, it is the pro-life speakers who are captive to the whim of individuals who can silence them at will. Like the decretal portion regarding "invited contact" found unconstitutional in *Madsen*, the "cease and desist" provision is not limited to a small geographical area. Rather, the "cease and desist" provision is all around the clinics anywhere a floating 15-foot bubble zone might exist. If the pro-life speaker is simply standing on the sidewalk with a picket sign and a pro-choice escort approaches her and says, "Stop," she must immediately withdraw at least 15-feet. Because the pro-life speaker is now within the escort's 15-foot zone, the escort may quickly and effectively censor her First Amendment rights by merely pursuing her to anywhere she runs. Because the 15-foot zone is always moving, the pro-life person must continue to retreat until the pro-choice escort decides to give up the pursuit. Consequently, this provision truly abolishes the public forum



doctrine because it may extend to any area -- even outside of the area immediately surrounding a clinic. Such a novel "floating no-speech zone" certainly burdens "more speech than necessary" and should be found unconstitutional. *Madsen*, 114 S. Ct. at 2525.

**a. The "cease and desist" provision is content-based.**

The "cease and desist" provision is much like the provisions struck down in *Madsen* which prohibited "intimidating" persons and limiting speech to a "conversation of a non-threatening nature." *Madsen*, 114 S. Ct. at 2529. In fact, the principle justification used by the District Court in granting the "cease and desist" provision was that persons felt "stressed" and "intimidated" by the pro-life speaker's message. *Madsen* also struck down a provision stating that once invited contact had been initiated, the person associated with the clinic could end the communication by stating such words as "stop," "withdraw," "back off," "get away," "leave me alone," or words or actions of similar import. *Id.* Like this case, in *Madsen*, when the desire to end the contact was made known, the pro-life speaker was required to immediately terminate the contact and leave the presence of the person protected by the injunction. *Id.*

In *Madsen*, the "invited contact" provision hinged on the emotive impact of the listener by using such words as "positive interest" and by providing that the listener affirmatively make the invitation to speak prior to the attempted contact. This Court held:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact

> may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. **Absent evidence that the protestor's speech is independently proscribable (i.e., "fighting words," or "threats"), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand.** "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedoms protected by the First Amendment.[15]

Yet, the "burden no more speech than necessary" *Madsen* test is only applicable to content-neutral injunctions. *Id.* If the injunction is content-based, the *Madsen* test does not even apply. *Id.* Yet, even under the content-neutral "burden no more speech then necessary" test, this Court found the consent provisions unconstitutional. In this case, the District Court justified the injunction by finding that the protesters' actions caused stress to individuals entering and leaving the abortion clinic. However, stress is merely the emotive impact or "listener reaction" caused by speech. "The emotive impact of speech on its audience is not a 'secondary effect.'" *Boos*, 485 U.S. at 321. Intellectual and emotive impact of speech is the primary impact of speech. A regulation which regulates speech due to its primary impact is content-based and is subject to the "most exacting scrutiny." *Id.* Because the protesters have not blocked clinic access, the only reason an individual would not want to enter the clinic would be due to the emotive and intellectual impact of the protests. An injunction, where the predominant intent is to regulate the

[15] *Id.* (quoting *Boos*, 485 U.S. at 322) (emphasis supplied) (citations and quotations omitted).



primary effects of speech, is content-based. *Id.* If this Court determines that the "cease and desist" provision is content-based, then the *Madsen* test is inapplicable and the provision is then subject to strict scrutiny. *Id.*

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992). "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991). Clearly the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Content-based regulations simply cannot be tolerated. *See Forsyth County*, 112 S. Ct. at 2404; *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). Stressing its disdain for content-based prohibitions, this Court stated that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'" *Mosley*, 408 U.S. at 95-96 (quoting *New York Times Co.*, 376 U.S. at 270).[16]

[16] "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 112 S. Ct. at 508. Content-based regulations of speech constitute "censorship in a most odious form" and

To be content-neutral, the "cease and desist" provision must be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984). In *Coates v. City of Cincinnati*, 402 U.S. 611, 612-14 (1971), this Court struck down an ordinance restricting speech if it was annoying to those passing by. If the First Amendment protects begging, *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993), critical picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), in-person urging of a boycott outside a targeted business, *Claiborne Hardware*, 458 U.S. at 907-08, and verbal "harassment" and "interference" with hunters, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), it should also protect speech which some persons might find "objectionable". *Madsen*, 114 S. Ct. at 2529.

**b. The "cease and desist" provision is viewpoint-based.**

Not only is the "cease and desist" provision content-based, it is also viewpoint-based. The provision not only regulates a broad class of speech (abortion speech), but further restricts a subclass of that speech (anti-abortion speech) "based on hostility -- or favoritism -- toward the underlying message expressed." *R.A.V.*, 112 S. Ct. at 2545. The injunction allows speech favoring abortion rights because such would be non-threatening to the person seeking the services of the clinic. Thus, within the category of abortion speech, only speech favoring abortion is permitted while speech opposing abortion is damned.

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clearly violate the first amendment. *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). "Education is the proper and preferable alternative to censorship." *Whitney*, 274 U.S. at 360.



Like the decretal portion of the *Madsen* injunction, the "cease and desist" provision gives license to one side of the abortion debate while squelching the other. *See Schacht v. United States*, 398 U.S. 58, 63 (1970) (statute "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment"); *see also Johnson*, 491 U.S. at 417. The pro-life speaker faces viewpoint censorship because no one on the pro-choice side of the issue is ever subject to the injunction's "cease and desist" provision. Because the "cease and desist" provision leaves control over protected expression with the listener, the "cease and desist" provision creates a "consent zone" which is legally indistinguishable from the "invited contact" zone struck down in *Madsen*. This differential treatment based upon viewpoint should meet with *exacting scrutiny*. *See R.A.V.*, 112 S. Ct. at 2544, 2546; *Simon & Schuster*, 112 S. Ct. at 508; *Boos*, 485 U.S. at 320-22. To satisfy strict scrutiny the injunction must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that end. *See Perry*, 460 U.S. at 45.

The government may not regulate speech "in ways that favor some view-points or ideas at the expense of others." *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 804 (1984); *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). In this case, the injunction is both content *and* viewpoint-based. As such, like the "invited contact" provision in *Madsen*, the "cease and desist" provision should be found unconstitutional because it "burdens more speech than necessary." *Madsen*, 114 S. Ct. at 2525. In the alternative, unlike *Madsen*, this challenged provisions are content and viewpoint-based and must be analyzed under strict scrutiny. The challenged provisions cannot withstand such scrutiny.

## II.
## AN INJUNCTION RESTRICTING SPEECH IMPOSED IN THE ABSENCE OF A PRIOR UNSUCCESSFUL NON-SPEECH-RESTRICTIVE INJUNCTION IS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

A prior restraint bears a "heavy presumption" against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The state must meet a "heavy burden" to impose a prior restraint on speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1963); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980); *Near v. Minnesota*, 283 U.S. 697, 713 (1931). The presumption against prior restraints is heavier, and the degree of protection broader, than that against limits on expression imposed by criminal statutes. Society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 526, 559-60 (1975) (emphasis in original). Indeed, this Court has stated that "the prevention of [prior restraints] was the leading purpose in the adoption of [the first amendment]." *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *see also Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.").[17]

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[17] A prior restraint lends "itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Such a deterrent "need not affect total suppression in order to create a prior restraint." *Conrad*, 420 U.S. at 556 n.8. Vesting the right to suppress speech to the discretion of the decision maker results in a prior restraint. *See Thornhill*, 310 U.S. at 90. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* at 97.



The injunction in *Carroll* was content-neutral but was analyzed as a prior restraint. *Carroll*, 393 U.S. at 181. This Court has traditionally condemned licensing schemes as prior restraints without regard to content restrictions. *Forsyth County v. The Nationalist Movement*, 112 S. Ct. 2395 (1992) (parade permits); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (*Shuttlesworth II*) (public demonstration permits). "Although a speech-restricting injunction may not attack content *as content* . . . it lends itself just as readily to the targeted expression of particular ideas." *Madsen*, 114 S. Ct. at 2538 (Scalia, J., dissenting). Justice Scalia rightly pointed out that:

> Our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the first amendment.". . . . The vice of content-based legislation -- what renders it deserving *of the high standard of strict scrutiny* -- is not that it is *always* used for invidious thought-control purposes, but that it *lends itself* to use for those purposes. And, because of the unavoidable "targeting. . . precisely the same is true of the speech-restricting injunction."[18]

In other words, the vice of a prior restraint, whether in a licensing scheme or an injunction, is not that the restriction *is content-based*, but that it lends itself to those purposes.

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[18] *Madsen*, 114 S. Ct. at 2539 (Scalia, J., dissenting) (quoting *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991)) (citations omitted) (emphasis in original).

Whether the decision maker is a judge, or an individual with whom discretionary licensing power is vested, makes no difference. The fact that the decision maker is able to make content-based restrictions is enough for a prior restraint. The injunction merely serves as a baton by which the government passes to private individuals the right of prior restraint over picketers in traditional public fora. Such prior restraints are presumptively invalid. *See New York Times Co.*, 403 U.S. at 713; *Bantam Books*, 372 U.S. at 70; *see also* Blasi, *Toward a Theory of Prior Restraint: A Central Linkage*, 66 MINN. L. REV. 11 (1981).

Provision (a) adequately protects the clinic and the public without infringing on free expression. Both the 15-foot bubble zone and "cease and desist" provisions violate the First Amendment and this Court should find them unconstitutional.

## CONCLUSION

In light of the above, this Court should reverse the judgment of the Second Circuit Court of Appeals.

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Supreme Court, U.S.
FILED
JUN 27 1995
CLERK

(12)

No. 95-1065

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS,

*Petitioners,*

vs.

PRO-CHOICE NETWORK OF WESTERN
NEW YORK, ET AL.,

*Respondents.*

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

## BRIEF OF AMICI CURIAE, THE STATES OF CONNECTICUT, ET AL., IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST

The amici curiae states, through their attorneys general, respectfully submit this brief in support of the Respondents. The amici support affirmance of the decision of the United States Court of Appeals for the Second Circuit upholding two provisions of an injunction which was issued to prevent further violence and obstruction outside of reproductive health care facilities in Western New York.

The amici states have a strong interest in the issues presented in this case, which directly relate to the ability of the states to protect the public health and safety by promoting orderly access to, and availability of, medical services, including reproductive health services. The states' interests in medical safety and privacy, as well as in protecting the public safety and order, and in controlling the costs of, and burdens on, law enforcement, are implicated by this case.

After this Court's decision in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), Congress sought to provide the state attorneys general with a federal cause of action to assist them in protecting these interests. The result of this effort is the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248. FACE permits the Attorney General of the United States, as well as the state attorneys general, to seek temporary, preliminary and permanent injunctive relief against persons who use force, threats of force or physical obstruction with intent to injure, intimidate, or interfere with those providing or seeking to obtain reproductive health services. Id. Although this case does not arise under FACE, it is likely to have a direct effect on the scope of injunctive relief available under FACE. The state attorneys general have a strong interest in ensuring that the injunctive relief available under FACE is sufficient to protect the public health and safety.

## SUMMARY OF ARGUMENT

Violence and blockades at reproductive health care facilities pose an increasingly serious threat to public safety on the federal, state and local levels. As the availability of legal abortions diminishes, the states are increasingly concerned with ensuring safe and adequate access to reproductive health care, while at the same time protecting the First Amendment rights of non-violent protesters. The nationwide campaign of violence and obstruction, aimed at eliminating the availability of abortion services, has created an overwhelming burden on law enforcement, with its accompanying costs. Further, the states have an interest in minimizing the medical risks to patients who seek access to reproductive health care facilities, as well as in protecting the privacy of the "captive audience" seeking health care in facilities which are the subject of violence and blockades.

Injunctions which have as their goal the elimination of violence and blockades should be crafted with careful attention to the facts of the particular case. Courts must strike a delicate balance between the need to protect the fundamental rights of freedom of speech and assembly on the one hand, and the duty of the government to protect the right of the citizens to safe and adequate access to health care, including reproductive health care, on the other.



## ARGUMENT

In Madsen v. Women's Health Center, 114 S. Ct. 2516 (1994), this Court examined an injunction which, like the one at issue in this case, was designed to protect the health and safety of persons seeking to provide and obtain reproductive health services.[1/] As in the instant case, the petitioners in Madsen claimed that the injunction violated their right of free speech, guaranteed by the First Amendment to the United States Constitution.[2/] Id. at 2521.

This Court, in finding that the injunction in Madsen was content-neutral, explained that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based." Id. at 2524 (citations omitted). Therefore, the Court explained, the constitutionality of the injunction was not properly assessed by application of the strictest scrutiny. Id. However, because an injunction carries "greater risks of censorship and discriminatory application" than a statute or ordinance, injunctions require "somewhat more stringent application of First Amendment principles . . . ." Id.

Accordingly, the Court concluded that the proper inquiry in evaluating the constitutionality of an injunction is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant

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1/ In Madsen, this Court upheld a 36-foot stationary buffer zone as it applied to property around the clinic entrances and parking lot, but struck it down as it applied to property at the back and side of the clinic. 114 S. Ct. at 2527-28. Further, the Court upheld noise restrictions, but struck down provisions controlling the use of signs, as well as a 300-foot "no approach zone." Id. at 2528-29. Finally, the Court struck down a 300-foot buffer zone around the residences of clinic staff. Id. at 2529-30.

2/ The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend I.

government interest." Id. at 2525 (citations omitted). It is within this framework that the instant injunction is properly evaluated.

## I. THE STATES HAVE A SIGNIFICANT INTEREST IN ENSURING SAFE AND ORDERLY ACCESS TO HEALTH CARE

In Madsen, this Court identified three governmental interests which, in combination, were "quite sufficient to justify an appropriately tailored injunction to protect them." Id. at 2526. First, the state has an interest in ensuring safe and adequate access to health care, including reproductive health care. Id. Second, there is a strong governmental interest in protecting the public safety and order, as well as in protecting property and promoting the free flow of traffic on streets and sidewalks. Id. Finally, the state has an interest in what this Court termed "medical privacy." Id. Each of these interests is present here.

### A. The States Have an Interest in Protecting Access to Health Care

In its consideration of FACE, Congress was presented with stunning statistics regarding the effects of clinic violence on the availability of reproductive health care. Congress found that 83 percent of all counties in the United States do not have an abortion provider, and that clinic violence and intimidation are at least partially responsible for this shortage. H.R. Rep. No. 306, 103d Cong., 2d Sess., 8 (1993), reprinted in 1994 U.S. Code Cong. & Admin. News 699, 705 (hereinafter "House report"); S. Rep. No. 117, 103d Cong., 1st Sess., 17 (1993)(hereinafter "Senate report")(citing Stanley K. Henshaw and Jennifer Van Vort, "Abortion Services in the United States, 1987 and 1988," Family Planning Perspectives, vol. 22, no. 3 (May/June 1990), at 106).



Congress found that there has been a "nationwide campaign of blockades, invasions, vandalism, threats and other violence," which is "barring access to facilities that provide reproductive health services." House report at 6. Between 1977 and 1993, there were more than one thousand acts of violence at reproductive health care facilities, including 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, 327 clinic invasions and 1 murder. House report at 6-7; Senate report at 3. Over 6,000 clinic blockades and other disruptions were reported during that same time period. House report at 7 (citation omitted).

Although reports of clinic violence have decreased somewhat since the passage of FACE in 1994, one-third of the clinics responding to the Feminist Majority Foundation's 1995 clinic violence survey reported at least one incident of "the most severe forms of clinic violence, including death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson and arson threats." Feminist Majority Foundation, 1995 Clinic Violence Survey Report 2 (1995)(hereinafter "1995 Violence Survey"). One result has been significant staff resignations, the majority of which were the result of the murders of two clinic workers in Brookline, Massachusetts on December 30, 1994. Id.

Violence and blockades have resulted in a "severe shortage of qualified providers available to perform safe and legal abortions in this country." Senate report at 3. Clinic violence has an impact beyond abortion, "on the delivery of a wide range of health care services." Senate report at 14. The vast majority of reproductive health care clinics -- 94.8 percent of the 310 clinics responding to the 1995 violence survey -- provide general health services in addition to abortion, including birth control (94.8 percent); cancer screening (68.1 percent); pre-natal care (24.8 percent); menopause treatment (58.1 percent); adoption and referral services

(22.3 percent); tubal sterilization (29.7 percent); infertility treatment (26.8 percent); treatment of premenstrual syndrome (51.6 percent); AIDS testing (60 percent); reproductive health counseling (83.2 percent); pregnancy counseling (86.8 percent); and testing and treatment for sexually transmitted diseases (82.3 percent). 1995 Violence Survey at 1. The availability of all of these health care services is jeopardized by persistent anti-abortion violence and obstruction at health care facilities.

Thus, the American Medical Association's Executive Vice President told Congress that, "'[u]nless the issue of continued violence at health care facilities is directly confronted, the practice of medicine will be severely affected.'" Senate report at 16 (quoting Hearings on S. 636 Before the Senate Labor and Human Resources Committee, 102nd Cong, 2nd Sess. (May 11, 1993)(statement of Dr. James S. Todd, Executive Vice President, American Medical Association)). This is no accident. It is the "express purpose of the violent and threatening activity . . . to deny women access to safe and legal abortion services." Senate report at 11. The field director of Operation Rescue National has declared that "'[w]e may not get laws changed or be able to change people's minds, . . . [b]ut if there is no one willing to conduct abortions, there are no abortions.'" Senate report at 11 (quoting Boodman, "The Death of Abortion Doctors," Washington Post, Apr. 20, 1993).

The remedy of injunction is of particular importance in addressing the issue of access. Attorney General Janet Reno testified that the civil remedy of injunction is necessary to address massive blockades because "'[c]ourts can fashion injunctive relief that will keep clinics operating.'" Senate report at 26-27 (quoting Hearings on S. 636 Before the Senate Labor and Human Resources Committee, 102nd Cong, 2nd Sess. (May 12, 1993)(statement of Janet Reno,



Attorney General)). In fact, over one third of the clinics responding to the 1995 violence survey are currently protected under civil injunctions. 1995 Violence Survey at 11.

Thus, the states' interest in preserving the availability of health care is directly related to the need for injunctive relief to address a broad range of violent and obstructive conduct. Although other civil and criminal remedies may be available in some jurisdictions, as well as under FACE, injunctions provide the states with the necessary flexibility to protect access to health care. This strong state interest justifies the remedy of injunction in and of itself; in conjunction with the states' other interests, the support for injunctive relief is overwhelming.

### B. The States Have an Overriding Interest in Public Safety

As this Court recognized in Madsen, "[t]he State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." 114 S. Ct. at 2526 (citation omitted). Indeed, "the preservation of liberty depends in part upon the maintenance of social order." City of Houston v. Hill, 482 U.S. 451, 472 (1987)(citing Terminiello v. Chicago, 337 U.S. 1, 37 (1949)). Much of the responsibility for the law enforcement response to violence and blockades at reproductive health care facilities falls upon the states and their political subdivisions. See, e.g., 1995 Violence Survey at 8 (the majority of FACE reports that clinics made to federal officials were referred to local law enforcement).

The states certainly have an interest -- in fact, a duty -- "to regulate the use of city streets and other facilities to assure the safety and convenience of the people . . . ." Cox v. Louisiana, 379 U.S. 536, 554 (1965)(citations omitted).

In fact, that duty is broader than the mere maintenance of order. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U.S. 77, 83 (1949).

There can be no doubt that the need for protection exists. One-fifth of all reproductive health care clinics responding to the 1995 violence survey reported FACE violations to federal or state authorities in 1995. 1995 Violence Survey at 8. "Throughout the country, pro-life groups have organized blockades designed to bar access to reproductive facilities and overwhelm local law enforcement." House report at 7. The levels of clinic violence are directly correlated to the law enforcement response; thus, decreases in clinic violence in 1995 were directly related to increased efforts on the part of law enforcement. 1995 Violence Survey at 10, 12.

Accordingly, the burdens on, and costs of, law enforcement as a result of ongoing clinic violence remain substantial. In considering FACE, Congress found that the large blockades in Wichita, Kansas and Buffalo, New York, as well as smaller blockades around the country, "place a significant strain on local law enforcement and judicial resources . . . ." House report at 3. For example, the Buffalo blockades, known as the Spring of Life, resulted in 605 arrests and law enforcement costs of $383,250. House report at 7; Senate report at 9. Congress was deeply concerned by the self-professed strategy of the anti-abortion movement to overload law enforcement and judicial resources so that they would fail.[3/] Senate report at 11. This strategy only

[3/] The Senate cited Randall Terry, To Rescue the Children 49 (1986)("You should check how overloaded the city's jail and court systems are. In many, many cities, the courts and jails are too



magnifies the need for, and costs of, law enforcement to combat clinic violence.

It is in this respect that the state interest is at its strongest. The duty of the government to maintain order and safety is fundamental. "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." Cox, 379 U.S. at 554. This strong state interest more than justifies the granting of injunctions to assist law enforcement in maintaining order and safety outside of reproductive health care facilities.

### C. The States Have an Interest in Protecting Medical Privacy and Safety

Finally, this Court, in Madsen, recognized the state's "strong interest in residential privacy . . . applied by analogy to medical privacy." 114 S. Ct. at 2526 (citing Frisby v. Schultz, 487 U.S. 474 (1988)). This interest stems from the realization that "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." Id. (citation omitted).

This Court has consistently followed the well-established rule that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." Cohen v. California, 403 U.S. 15, 21 (1971). Thus, when it is possible for the listener or viewer to "'avoid further bombardment of [his] sensibilities simply by averting [his] eyes,'" the Constitution does not permit the government to step in. Erznokzik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975)(quoting Cohen,

overloaded to deal with rescue missions").

403 U.S. at 21). Where, however, this Court has recognized that a substantial privacy interest in access to reproductive health care exists, see, e.g., Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 766 (1986), and that this interest is being impeded "in an essentially intolerable manner," Cohen, 403 U.S. at 21, narrowly tailored restrictions on speech are permissible.[4/]

In its consideration of FACE, Congress relied on the findings of the trial court in this case regarding the adverse effects of "targeted picketing" of facilities that perform abortions on the "psychological and physical well-being" of patients, including patients who are there to obtain services other than abortion.

> "[T]he risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery."

Senate report at 15 (quoting Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992)).

Other medical risks accrue if completion of the procedure is delayed. Id. (citing Pro-Choice Network, 799 F. Supp. at 1427)(once laminaria is inserted to begin dilation of the cervix, timely removal is necessary to avoid infection, bleeding and other potentially life-threatening complications). As Congress noted, this danger is not hypothetical. In National Organization for Women v. Operation Rescue, 726 F. Supp. 1483, 1490 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd on other grounds sub nom Bray, 506 U.S. 263 (1993), the court found that one result of the blockading of a District of Columbia clinic for 11 hours was that five women who had begun the abortion procedure by having laminaria inserted the day before were unable to return to the clinic to complete the procedure. Senate report at 16.[5/]

Perhaps the anecdotal evidence offered in support of these findings is the most impressive. Sylvia Doe, of Virginia, was advised by her doctor to have an abortion for health reasons. Clinic Blockades: Hearings on S. 636 Before the Subcommittee of Crime and Criminal Justice of the Senate Labor and Human Resources Committee, 102nd Cong., 2nd Sess. 10 (1992)(hereinafter "Hearings")(statement of Sylvia Doe). Because there was no provider of late-term abortions in her state, she was forced to travel to

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4/ Not only is there a recognized right to privacy in matters pertaining to reproductive health care, but courts also have recognized that "[p]rivacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights." Galella v. Onassis, 487 F.2d 986, 995 n. 12 (2d Cir. 1973)(citing Katz v. United States, 389 U.S. 347, 350 n. 5 (1967)(other citations omitted)). Thus, "[a] group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." Cox, 379 U.S. at 555. Yet, that is precisely what so-called "sidewalk counselors" purport to be permitted to do in exercise of their right to freedom of speech.

5/ Anti-abortion protest has other effects on medical privacy and safety. For example, in Portland, Oregon, anti-abortion protesters impeded the passage of ambulance attendants who had been called to a clinic to transport a patient to a hospital in a medical emergency. Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681, 683 (9th Cir. 1988).

Kansas to obtain the necessary services. Id. When she arrived, she found that Operation Rescue had blockaded the clinic. Id. She waited for two weeks while the clinic was entirely closed. Id. When the clinic finally opened, Ms. Doe was trapped in her car for many hours, three days in a row, while being surrounded by anti-abortion protesters who were shouting at her, calling her a murderer. Id. When she finally made it into the clinic, it was surrounded by protesters, and the clinic was subjected to repeated bomb threats, necessitating evacuations of the clinic. Id. at 11. Ms. Doe stated that the experience was "devastating." Id. at 12.

This experience is shared not only by others who have had abortions, but by people who sought other kinds of medical care in buildings in which one tenant was an abortion provider. Kathryn Maxwell, of Canton, Mississippi, was four months into a high risk pregnancy due to her age and the fact that she was afflicted with asthma. Hearings at 18. She went to her obstetrician for a regular visit, accompanied by her 12 year old daughter, and was met by members of Operation Rescue, who told her that she would not be permitted to enter the building. Id. Both she and her young daughter were shown graphic pictures of fetuses at various stages of development. Id. Despite the fact that she repeatedly told the protesters that she was not going to have an abortion, Ms. Maxwell was forced to use the stairs rather than the elevator, and was repeatedly blocked on the staircase, excusing herself and pushing her way forward until she finally arrived at her doctor's office. Id. The police declined to provide assistance, stating that "if [they] did, there could be a potential riot." Id. at 19. Ms. Maxwell heard the receptionist from a psychiatrist's office complaining to the police, indicating that patients on medication were getting harassed by protesters, and were suffering adverse effects.



Id. Ms. Maxwell finally saw her doctor later that day, after the protesters had gone. Id.

In Washington, D.C., only a few short miles from the Supreme Court, the Hillcrest Women's Surgi-Center reports consistent anti-abortion violence and obstruction. Clark, "Abortion Clinics: Life Under Siege," Congressional Quarterly (April 13, 1995), reprinted in WESTLAW CG NEWS 4/13/95 at 1. The chanting of anti-abortion demonstrators can be heard inside the clinic, causing one nurse to report that the patients "get emotionally riled, and ask us, 'How can you let these people come here?'" Id. at 2.

These accounts illustrate the psychological and physical harm to patients of reproductive health care facilities which are the subject of anti-abortion violence and obstruction. The evidence demonstrates that the harm to this "captive audience" is not the result of the sort of "'insulting, and even outrageous, speech'" which must be tolerated "'in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" Madsen, 114 S. Ct. at 2529 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). Instead, this serious psychological and physical harm is the result of "targeted picketing" which is "so infused with violence as to be indistinguishable from a threat of physical harm." Id. (citing Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292-93 (1941)). The government has an interest in ensuring not only that its citizens have access to medical care, but also that such access is safe and non-threatening. Injunctions such as the one at issue in this case are necessary to serve that government interest.

In sum, the states have an interest in ensuring safe, orderly access to health care of all kinds, including reproductive health care. Each of the states' interests is significant; taken together, they provide overwhelming justification for an award of injunctive relief.

## II. THE INQUIRY INTO THE SCOPE OF AN INJUNCTION SHOULD BE FACT-BASED, AND THE INJUNCTION SHOULD BE SUFFICIENT TO PROTECT THE STATES' INTERESTS

The Madsen test requires that content-neutral injunctive provisions be analyzed to ensure that they "burden no more speech than necessary to serve a significant government interest."[6/] 114 S. Ct. at 2525 (citations omitted). This test is more rigorous than that which is applied to content-neutral statutory provisions, but less stringent than that which is applied to content-based statutes and regulations. Id. at 2524-25 (citations omitted).

Precisely what this means for any particular injunctive provision is less than certain. However, three guiding principles can be established. First, the level of "fit" between the government interest and the injunctive provision must be precise, but the injunction need not be the very least restrictive means of accomplishing the government's goals. Second, the inquiry pertaining to the proper scope of an injunction must be tied to the specific facts of the particular case, including the nature of the protests, the physical layout of the premises to be protected, and any other

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6/ The amici states assume that the instant injunction, like that which was scrutinized in Madsen, is content-neutral. The test for content-neutrality is "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" 114 S. Ct. at 2523 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(other citations omitted)). As in Madsen, "the fact that the injunction cover[s] people with a particular viewpoint does not itself render the injunction content or viewpoint based." Id. at 2524. The government's interest, as set forth above, is related to the deleterious effects of the conduct of anti-abortion protesters, and not to their message. As such, it survives the Court's test of content-neutrality.



considerations necessary to fashion relief which responds to the precise needs of the case. Finally, although the First Amendment rights of the protesters must be given due consideration, the injunction should be sufficient to protect the significant government interests which are implicated by violence and blockades at reproductive health care facilities.[7/]

### A. The Injunction Should be Narrowly Drawn, but Need Not be the Least Restrictive Alternative

The Madsen test represents an intermediate review of content-neutral injunctions, more rigorous than the test applied to content-neutral statutes, but less so than the test applied to content-based regulations. Id. at 2524-25 (citations omitted). Although it is clear that, in the context of intermediate review, the government interest must be "significant,"[8/] the required level of "fit" between the government interest and the injunction is less apparent.

Content-neutral statutes are scrutinized to determine that they are "narrowly tailored to serve the government's legitimate, content neutral interests . . . ." Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). Further, a content-neutral statute should "leave open ample alternative

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7/ Each of these points is discussed by the amici states without a detailed analysis of how it applies to the facts of this particular case. The application of these points of law is more appropriately discussed by the Respondents in light of their mastery of the record.

8/ Under Madsen's intermediate test, the government interest must be "significant," as opposed to "legitimate," on the one hand, Ward, 491 U.S. at 798 (1989)(state interest must be legitimate), or "compelling," on the other. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)(state interest must be compelling).

channels of communication." United States v. Grace, 461 U.S. 171, 177 (1983)(citations omitted).

A content-neutral legislative restriction on speech "need not be the least restrictive or least intrusive means" of serving the government interest. Ward, 491 U.S. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id. at 800 (emphasis added).

On the other hand, a content-based restriction, or one which works an "absolute prohibition" on speech, "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." Grace, 461 U.S. at 177 (citing Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)(other citation omitted)). In such a case, a legislative restriction on speech must be the least restrictive means of achieving the government's interest, such that the ability of a court to identify a less restrictive alternative is fatal. Boos v. Barry, 485 U.S. 312, 329 (1988).

The Madsen test falls somewhere between these two polarities. Accordingly, under Madsen, there must be something more than a mere nexus between the injunction and the government interests, see, e.g., Grace, 461 U.S. at 181, but the injunction need not survive the "most exacting scrutiny." See, e.g., Boos, 485 U.S. at 321.

The District of Columbia Circuit's decision in National Organization for Women v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994), provides a helpful example. There, the court examined an injunction which prohibited persons from "inducing" and "encouraging" others to engage in trespassing or blockading clinics. Id. at 656. The



court explained that the district court intended this language to prohibit "inciting" illegal acts. Id. Since the word "inciting" has a more precise legal definition than do the words "inducing" and "encouraging," the court concluded that "the injunction introduces an easily avoidable measure of unclarity as to what speech and conduct is prohibited." Id. at 657. The court suggested that, with the substitution of the word "inciting," the "injunction [will] accomplish[ ] all it sets out to accomplish, while making it plain to all that no protected speech is impermissibly burdened." Id.

The District of Columbia Circuit struck precisely the sort of balance that is required by Madsen. It required that the language be sufficiently precise as to avoid vagueness and overinclusiveness, but also that it be adequate to serve the government's interests. Id. By correcting "an easily avoidable measure of unclarity," the court ensured that the injunction was not overly burdensome, but maintained the intended scope of relief. Id. It is this sort of sensitivity to the needs of the government, on the one hand, and the rights of persons to free speech, on the other, that is required by Madsen.

The test set forth by this Court is not capable of formulaic application. It does require clarity and care, but does not require perfect exactitude; it does require precision, but does not require "surgical precision." Madsen, 114 S. Ct. at 2525 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)). In short, Madsen requires that the court carefully craft an injunction which strikes a delicate balance between the states' significant interest and the "concomitant right of the people of free speech and assembly." Cox, 379 U.S. at 554 (citations omitted).

### B. The Inquiry Regarding the Scope of the Injunction Should be Fact Specific

An injunction "must be read in the context of its circumstances." Milk Wagon Drivers, 312 U.S. at 298. This Court tacitly acknowledged this well-established principle in Madsen. 114 S. Ct. at 2527 (citing Milk Wagon Drivers, 312 U.S. at 294) ("deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review").[9/] Accordingly, in reviewing the injunction crafted by the trial court in this case, this Court should not endeavor to establish universal rules about the propriety, or lack thereof, of any particular type of injunctive provision. Instead, the Court should determine the propriety of the injunction only in the context of this specific dispute.

This Court has agreed to review two injunctive provisions which were designed to protect access to reproductive health care facilities in Western New York. First, the trial court fashioned a fifteen-foot buffer zone around entrances to those medical facilities, as well as around "any person or vehicle seeking access to or leaving the facilities" except that two "sidewalk counselors" may enter the zone.[10/] Pro-Choice Network v. Schenck, 67 F.3d 377, 384 (2d Cir. 1995). Second, the injunction provides that, if a person indicates that he or she does not want to be counseled, or wants to walk away, the two protesters allowed inside the fifteen foot zone must "cease and desist," i.e., they must

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[9/] See also Madsen, 114 S. Ct. at 2532 (Stevens, J., concurring in part and dissenting in part)("appropriate deference should be given to the trial judge's familiarity with the facts of the underlying case").

[10/] The fifteen-foot zone around persons and vehicles is called a "bubble zone," as distinguished from a "buffer zone." A bubble zone is one that moves or "floats," whereas a buffer zone is stationary.



leave the zone but may continue their "counseling" and demonstrating so long as they remain at a distance of fifteen feet from the person entering or leaving the facility. Id. at 384-85.

The inquiry into the propriety of these injunctive provisions entails a close examination of the factual circumstances of a given case. Injunctions are equitable remedies. Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982). "'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.'" Id. at 329-30 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)). An injunction should be "adjusted to a particular situation . . . in accord with the settled practice of equity." Milk Wagon Drivers, 312 U.S. at 298 (citation omitted).

Equity demands that the scope and character of an injunction be controlled by the facts of a given dispute rather than by a set of universal rules, at least in part because an injunctive provision that adequately serves the government interest in one setting may not do so in another. For example, in Madsen, the Court struck down a broad 300-foot "no approach" zone, but recognized that, in a different case -- where there was "evidence that protesters' speech is independently proscribable . . . or is so infused with violence as to be indistinguishable from a threat of physical harm" -- such a zone might be appropriate. 114 S. Ct. at 2529. This Court refrained from stating a per se rule outlawing all injunctive "no approach" zones in recognition of the unlimited combinations of factors that may exist from case to case.

A specific type of injunctive provision might be more restrictive of speech in one factual setting but less restrictive in another. For example, although many

reproductive health care facilities have adjoining parking lots, so that a patient exits her car onto private property, this is not true in all cases. In Bridgeport, Connecticut, Summit Women's Center, a reproductive health care facility, is located at the intersection of two urban streets.[11/] The public sidewalk is immediately adjacent to the front and side entrances to the clinic. There are no parking facilities on the clinic's property or directly adjacent to the clinic; thus, the majority of those seeking access to the facility by car must park in a lot at least 100 feet away from the entrance to Summit.[12/] Additional parking is located approximately one city block away from the clinic's entrance.

In light of this unique set of facts, a court would be faced with the challenge of crafting an injunction designed to ensure that the injunction restricted "no more speech than necessary" to serve the government's significant interests in facilitating safe access to medical services and ensuring that pedestrian and vehicular traffic is not obstructed. 114 S. Ct. at 2525. If the court's only tool was a stationary zone, then in order to ensure that persons seeking access to the clinic were not subjected to future acts of "force, threats of force and physical obstruction"[13/] during their passage from their car to the clinic, the court would have to create a zone large enough to reach from the clinic entrance to the parking lots. Yet, such a large zone would effectively eliminate the right

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11/ United States and State of Connecticut v. Scott, et al., Civil Action No. 3:95CV01216 (AHN)(D.Conn. June 21, 1995).

12/ Patients travel to the Bridgeport clinic on foot, as well.

13/ 18 U.S.C. §248. The issue of the scope of injunctive relief would not be reached in a FACE case unless the plaintiffs were able to establish that, in the past, there had been violations of FACE, i.e, the use of force, threats of force or physical obstruction with intent to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services. Thus, for purposes of this example, the amici assume that such a history exists.



of protesters to picket the clinic and to engage in so-called "sidewalk counseling" in any meaningful proximity to the facility.

A reasonable floating bubble zone, on the other hand, would, in this factual setting, be significantly less restrictive of the free speech rights of protesters while simultaneously addressing the state interests. Rather than prohibiting all protest activity within a large area, the floating zone would result in a more precise restriction, allowing protesters to communicate their message in close enough proximity to be heard, but with enough distance between them and the clinic patient or staff to ensure against the use of violence and blockades. When coupled with a "cease and desist" provision, a bubble zone would be even less restrictive of speech, allowing protesters to approach targeted individuals with their message, compelling them to withdraw a few steps only if requested to do so. This example demonstrates that the only way to properly measure the extent to which a particular injunctive provision restricts speech is by reference to the facts of the specific dispute.[14/]

Similarly, the effectiveness of an injunction in serving the government interest in safe and orderly access to health care also must be measured by reference to the facts of a given dispute. For example, this Court in Madsen found that a 36-foot stationary buffer zone was sufficient to protect "the free access of patients and staff." 114 S. Ct. at 2526. However, in the example set forth above, a stationary 36-foot zone would leave patients and staff unprotected during a significant portion of their passage from their car to the clinic. What was sufficient protection in Madsen, unless expanded or combined with other injunctive relief, would

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14/ The Petitioners appear to agree with this analysis. (See Brief of Petitioners at 48 n. 23).

not be sufficient to prevent future instances of violence and obstruction at a facility with a very different physical layout.

Thus, in reviewing the injunctive relief in this case, this Court should refrain, as it did in Madsen, from establishing a rule that any type of injunctive provision is per se unconstitutional in all circumstances. Instead, the Court should be sensitive to the facts of the case, including the physical layout of the various facilities, as well as the nature of the blockades, harassment and intimidation which gave rise to the need for injunctive relief. Only in so doing can the Court be sure to provide adequate protections while burdening "no more speech than necessary." Id. at 2525.

### C. The Injunction Should be Sufficient to Serve the Significant State Interests

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." Cox, 379 U.S. at 554. Thus, while the free speech rights of anti-abortion protesters should be respected, an injunction issued on the basis of findings that the defendants have engaged in violence and blockading should be sufficient to serve the significant state interests upon which it is based. In other words, not only should the courts take care that an injunction is sufficiently limited to provide adequate "'breathing space to the freedoms protected by the First Amendment,'" Madsen, 114 S. Ct. at 2529 (quoting Boos, 485 U.S. at 322), but courts also should ensure that an injunction is sufficiently broad to serve the significant state interest in protecting safe and orderly access to health care.

This Court has repeatedly recognized that special protections are appropriate in the context of health care. In NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-84 n. 12



(1979), the Court explained that "'[h]ospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, . . . and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.'" (quoting Beth Israel Hospital v. NLRB, 437 U.S. 483, 509 (1978)(Blackmun, J., concurring)). As the Court in Madsen recognized, the same is true of facilities which provide reproductive health care. 114 S. Ct. at 2528 (quoting NLRB v. Baptist Hospital, Inc., 442 U.S. at 783-84 n. 12).

Further, the Court has acknowledged that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." International Society For Krishna Consciousness v. Lee, 505 U.S. 672, 684 (1992)(upholding ban on airport solicitation by religious group). So-called "sidewalk counseling" presents precisely the same risks. In both cases, "[t]he skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children and those suffering physical impairment and who cannot easily avoid the solicitation." Id. Just as it was appropriate for the government to restrict the religious solicitation in Lee, it is equally appropriate for the government to restrict the "sidewalk counseling" of anti-abortion advocates who use violence, blockades, fear and intimidation as means of duress against a captive audience.

Restrictions on conduct in other contexts have been upheld when necessary to protect ingress to and egress from public buildings, Cameron v. Johnson, 390 U.S. 611 (1968); to protect against targeted picketing of a residence, Frisby v. Schultz, 487 U.S. at 483; and to protect foreign embassies, Boos, 485 U.S. at 331-32.[15] This was so even in

[15] In Boos, the Court struck down a provision which prohibited the display of signs critical of foreign governments, but upheld a

the absence of the sort of history of violence and blockades which exists in the context of reproductive health care facilities.[16/] Here, especially in light of that history, restrictions on conduct for the purpose of protecting access to reproductive health care should be upheld, as well.

In other contexts, when the "exercise of free speech rights conflicts with another fundamental right," this Court has held that a restriction on speech satisfied even the most exacting scrutiny. Burson v. Freeman, 504 U.S. 191, 211 (1992). For example, in Burson, this Court upheld an ordinance which required solicitors to stand 100 feet from the entrances to polling places on the ground that government has a compelling interest in protecting the fundamental right to vote without "intimidation and fraud." Id. Again, the Court approved this content-based restriction on speech without any showing of a history of violence or blockades. Id. In contrast, here there have been findings of persistent harassment, intimidation and blockades which threaten the health and well-being of persons seeking to exercise their fundamental right of access to reproductive health care.[17/]

provision which prohibited congregation within a 500-foot zone surrounding foreign embassies – a significantly greater zone than that at issue here. 485 U.S. at 329, 331-32.

16/ In Cameron, there was a history of peaceful picketing along a march route which had the effect of obstructing ingress to, and egress from, public buildings. 390 U.S. at 614-15. In Frisby, anti-abortion protesters had picketed in an orderly and peaceful manner outside the residence of a physician who performed abortions. 487 U.S. at 476. In Boos, picketers wished to carry signs critical of foreign governments outside of foreign embassies. 485 U.S. at 315.

17/ See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 852-53 (1992)(quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)(other citations omitted))(decisions relating to procreation, contraception, family relationship and child rearing, including the decision "'whether to bear or beget a child,'" "are central to personal dignity and autonomy, [and, thus,] are central to the



Accordingly, the justification for imposing a restriction on the activities of the anti-abortion protesters in this case is even stronger than that supporting the restriction in Burson.

Physical assaults and blockades are not expressive conduct protected by the First Amendment. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993)(citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)). The fact that conduct may be engaged in for the purpose of expressing a point of view does not cloak such conduct in the protections afforded to speech. Id. at 2199 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)). Further, "'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" Cox, 379 U.S. at 555 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)). None of these principles is any less sound in the context of abortion.

Simply because "the context here is abortion," the Court should not depart from its "First Amendment precedents and traditions . . . ." Madsen, 114 S. Ct. at 2534-355 (Scalia, J., dissenting). This Court has long recognized that "acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence." Milk Wagon Drivers, 312 U.S. at 294 (permitting restriction on picketing which is enmeshed with violence). The record of violence and blockades, both nationwide and in Buffalo, New York, was significant enough to cause Congress to

liberty protected by the Fourteenth Amendment"). As the Second Circuit stated, the evidence in this case demonstrates that what the petitioners claim is peaceful protest is, in fact, a "constructive blockade" characterized by "harassment and intimidation" which "causes stress and sometimes even physical injury to the patients and medical staff." Pro-Choice Network v. Schenck, 67 F.3d 377, 383 (2d Cir. 1995).

provide a federal cause of action. House report at 7; Senate report at 9. It also is significant enough to warrant a sufficiently broad judicial remedy.

## CONCLUSION

The states have an interest in ensuring safe and orderly access to health care, including reproductive health care. This interest encompasses concomitant interests in controlling the burdens on, and costs of, law enforcement, as well as in medical safety and privacy. These interests, taken together, are more than sufficient to justify an award of injunctive relief which is carefully crafted to burden no more speech than is necessary when considered in the context of the facts of the particular case, while simultaneously being sufficiently broad to protect the interests of the states.

For these reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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(14)

No. 95-1065

Supreme Court, U.S.
FILED
JUL 1 1996

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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REVEREND PAUL SCHENCK AND DWIGHT SAUNDERS,
*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR THE CITY OF PHOENIX, ARIZONA, AS AMICUS CURIAE SUPPORTING RESPONDENTS

---

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## QUESTION PRESENTED

Amicus will address the following question:

Whether the First Amendment is violated by an injunction that requires petitioners to move fifteen feet away from any person seeking access to a health services facility who specifically indicates a desire that petitioners move away.

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---

## BRIEF FOR THE CITY OF PHOENIX, ARIZONA, AS AMICUS CURIAE SUPPORTING RESPONDENTS

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### INTEREST OF THE AMICUS CURIAE

An ordinance of the City of Phoenix, Section 23-10.1 of the Phoenix City Code, makes it unlawful for any person "in the course of demonstration activity" within 100 feet of a health care facility to "fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request." The constitutionality of Section 23-10.1 was upheld by the United States Court of Appeals for the Ninth Circuit in *Sabelko v. City of Phoenix*, 68 F.3d 1169 (1995). A petition for a writ of certiorari seeking to review the Ninth Circuit's judgment in that case was filed on March 4, 1996 (*Sabelko v. City of Phoenix*, No. 95-1415) and is pending before this Court.

Petitioners both here and in No. 95-1415 assert that Section 23-10.1 is similar to Paragraph 1(c) of the injunction at issue in this case. See 95-1415 Pet. 10; 95-1065 Pet. Br. 36 & n.21. The continued pendency of the certiorari petition in No. 95-1415 suggests that the Court may dispose of that petition in light of its decision in this case. Because the ultimate decision on the constitutionality of the City's ordinance may, therefore, be affected by the decision in this case, the City of Phoenix has a direct and immediate interest in this case.

## STATEMENT

Petitioners are two individuals who, together with numerous other individuals and various organizations, were sued by respondents in the United States District Court for the Western District of New York. Respondents asserted that petitioners and their co-defendants were members of a conspiracy that sought, through illegal means, to obstruct access to various health care facilities that provide abortions. Pet. App. A-5 to A-6. After extensive proceedings, the district court issued a preliminary injunction that forbade petitioners and the other defendants from, among other things, "demonstrating within fifteen feet" of "any person or vehicle seeking access to" a health services facility in the Western District of New York at which abortions are performed. Pet. App. A-34.

Paragraph 1(c) of the injunction further provided, however, that "sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited." Pet. App. A-34 to A-35. But paragraph 1(c), as subsequently modified, went on to provide that any persons engaged in such "sidewalk counseling" were to "cease and desist from such counseling," and adhere to the fifteen foot restriction, whenever "the targeted person or group 'indicates, either verbally or non-verbally, that they do not wish to be counseled' " (*id.* at A-35, A-29; citation omitted).



Petitioners challenged the injunction, including paragraph 1(c), on a variety of grounds. In the decision below, the United States Court of Appeals for the Second Circuit, sitting en banc, rejected petitioners' claim that paragraph 1(c) violates the First Amendment. See Pet. App. A-16 to A-17. Two opinions each were joined by a majority of the judges on the en banc court of appeals.

The opinion of the court, written by Judge Oakes, began by outlining the facts, found by the district court, that formed the basis for the injunction. Paragraph 1(c) was concerned with a practice that petitioners and their co-defendants called "sidewalk counseling," which consists of "[d]emonstrators[']approach[ing] patients entering the clinics, offer[ing] them anti-abortion literature, and try-[ing] to convince them not to have an abortion." Pet. App. A-10. But while petitioners "contend[] that this sidewalk counseling is done in a peaceful manner," in fact "the demonstrators often become angry and frustrated when patients persist in entering the clinic." *Ibid.* The court of appeals, quoting the district court's findings, then described the conduct of the defendants in this case (*id.* at A-10 to A-11; citation omitted):

> The "counselors" then turn to harassing, badgering, intimidating and yelling at the patients * * * in order to dissuade them from entering. They continue to do so even after the patients signal their desire to be left alone. The "sidewalk counselors" often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level.

"Many of the sidewalk counselors," the court of appeals noted, "have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts, and medical staff." *Id.* at A-11. The court of appeals also noted extensive evidence about the harmful medical effects of the practices in which petitioners and their co-defendants engaged. *Ibid.*

On the basis of this record, the court of appeals concluded that the restriction contained in paragraph 1(c)

"burden[s] [no] more speech than necessary to accomplish its goal" and is therefore constitutional under this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). Pet. App. A-33 (brackets in original; internal quotation marks omitted); see 114 S. Ct. at 2525. The court noted that paragraph 1(c) allows petitioners, or any two "sidewalk counselors," to approach "their target audience face-to-face * * * without being invited." Pet. App. A-28. The "counselors," the court of appeals further noted, "need not retreat unless expressly rejected by a counselee, and then only to a distance of fifteen feet." *Ibid.* The court stated that the purpose of paragraph 1(c) was to "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." Pet. App. A-30. The court concluded that "[t]his purpose is content-neutral, as it is the demonstrators' physical proximity which is regulated rather than their message." *Ibid.* The court of appeals also upheld the district court's conclusion that, without a provision like paragraph 1(c), "women seeking access to the clinics [would be] 'captive' to [petitioners'] invasive conduct and unable to 'walk away' " (Pet. App. A-31; citation omitted).

Judge Winter's concurring opinion, also joined by a majority of the court, embraced what it described as the "somewhat broader principle" that "the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs." Pet. App. A-37. Specifically, Judge Winter stated, "there is no right to invade the personal space of individuals going about lawful business, to dog their footsteps or chase them down a street, to scream or gesticulate in their faces, or to do anything else that cannot be fairly described as an attempt at peaceful persuasion." *Id.* at A-42.

Judge Winter acknowledged that "the legal breathing space afforded the protestor in defining coercion or obstruction may vary according to the forum and ability of the audience to avoid the protest at little cost." Pet. App. A-43. In this case, however, Judge Winter stated, there was "a considerable amount of obstruction and bullying by both the protestors and the self-described counselors." *Ibid.* Specifically, Judge Winter noted, "some of the counselors in the instant matter have in the past resorted to bullying as soon as their proffer of advice was rebuffed" (*id.* at A-45). Judge Winter reasoned that "[a] nose-to-nose confrontation is hardly essential to a conveying of the protestors' views and will, given their history of intimidation, be reasonably perceived by those seeking to enter the clinic as intimidating." *Id.* at A-44. He accordingly concluded that there is "no First Amendment barrier to a requirement that, once the would-be counselors have had an opportunity to offer advice and it is declined, they must respect the buffer area applicable to protestors." *Id.* at A-45.



Judges Meskill and Altimari dissented. They stated, among other things, that "[a]s long as the injunction ensures access to the clinics," and "patients approaching the clinics * * * can escape the unwanted message simply by continuing to walk towards and entering the clinic." Pet. App. A-64. Further, the dissenters said, "[w]hile counselors may cause distress to those attempting to enter the clinics, such offense is an inevitable cost of free expression under the First Amendment." *Id.* at A-65.

## SUMMARY OF ARGUMENT

I. Although this case concerns the constitutionality of an injunction, the Court's decision is likely to influence litigation over city ordinances and other legislation that has some similarities to the injunction at issue here. The Court may, therefore, wish to reaffirm the principle that general legislative measures are subject to a less stringent standard of review than injunctions. Because legislative measures apply to a broad class of people, instead of just

a limited group of named individuals, there is a built-in political check against the possibility that legislation will restrict speech unduly. An individual who wishes to challenge a legislative measure can take advantage of a variety of procedural protections that are not available to a person who challenges an injunction. And the inherent differences between the legislative and judicial processes—courts must act on the basis of an adjudicative record, whereas legislatures can, and indeed should, draw on a broader range of sources of information—make it appropriate to allow a legislature more leeway in justifying its actions.

II. The concept underlying paragraph 1(c) of the injunction at issue here—that a speaker may approach an individual entering a health care facility but must move a short distance away from any individual who so requests—is fully consistent with the First Amendment.

A. 1. Paragraph 1(c), and measures like it, impose only a narrow and limited restriction on individuals who wish to engage in expressive activities. Petitioners are free to speak, jeer, and wave placards even at individuals entering a health care clinic, so long as they stay fifteen feet away. Moreover, petitioners, or any other pair of demonstrators, are free to approach such individuals and speak to them face to face. The only limitation paragraph 1(c) imposes is that if those individuals specifically object, petitioners must move back a few paces before resuming their expressive activity.

This modest limitation on petitioners' conduct protects interests of the first magnitude. The Court has repeatedly ruled that the First Amendment does not give anyone a right to force unwelcome speech on an individual who objects. This principle applies even to unwanted mail. *A fortiori*, it should apply to highly instrusive conduct like that in which petitioners seek to engage.

2. Petitioners suggest that an individual's interest in not being subjected to such conduct vanishes once an



individual leaves the home. This Court's decisions do not support such an implausible rule. On the contrary, the Court's decisions dealing with the regulation of speech in public places have emphasized that speakers are allowed a greater latitude in such places precisely because unwilling listeners can, if they wish, simply avert their eyes, walk away, or otherwise minimize their exposure to the speech that they find objectionable or intrusive.

Measures like paragraph 1(c) are designed precisely to ensure that unwilling listeners will be able to exercise this prerogative to avert their eyes and walk away—in this case, unwilling listeners who are not random members of the public but who are entering a health care facility and are therefore particularly vulnerable.

B. A measure like paragraph 1(c) does not constitute an impermissible "audience veto" of speech. The notion of an "audience veto" or a "heckler's veto" is that the hostility of some members of an audience should not be a justification for restricting a speaker's ability to speak to *other* members of the audience, or members of a broader audience. It does not mean that a speaker has a right to continue to force speech on the very individual who has indicated a desire not to be subjected to it. In any event, paragraph 1(c) does not compel petitioners to stop speaking to anyone: it only requires them to move a short distance away from a specific individual who specifically objects. There is no "veto" of any speech—only of physically confrontational tactics.

C. The decision below is fully consistent with the portion of *Madsen* that invalidated a restriction on approaching persons entering a clinic who did not "indicate[] a desire to communicate." The *Madsen* restriction was both more broad and more vague. Perhaps most important, the *Madsen* restriction placed the burden on the speaker to obtain consent to approach a person; paragraph 1(c) allows petitioners to speak to anyone unless and until that

person specifically objects. That distinction is crucial under the Court's decisions.

D. Measures like paragraph 1(c) therefore present no special concerns under the First Amendment. The only remaining question is whether paragraph 1(c) itself is an appropriate remedy in this case. In view of the history of intimidation and harassment revealed by the record, the district court's decision to impose this remedy, upheld by the court of appeals, was plainly warranted.

## ARGUMENT

### I. THE COURT SHOULD CONTINUE TO APPLY A LESS RESTRICTIVE STANDARD TO GENERAL LEGISLATION LIMITING THE TIME, PLACE, AND MANNER OF DEMONSTRATIONS THAN IT APPLIES TO INJUNCTIONS AIMED AT SPECIFIC INDIVIDUALS.

This case concerns the constitutionality of an injunction that applies only to petitioners and certain other named individuals and groups. Some of the provisions found in the injunction, however, including the restriction in paragraph 1(c), are comparable in certain respects to restrictions found in legislative enactments. For example, as we have said, Section 23-10.1 of the City Code of the City of Phoenix makes it unlawful for a demonstrator near a health care facility to refuse to move eight feet away from any individual who makes "a clearly communicated request" that the demonstrator withdraw.[1]

[1] The Phoenix ordinance (which is set forth at 95-1415 Pet. App. 56a-58a) applies to the "access area" of a health care facility, which is defined as any portion of a public street "or other public place or any place open to the public" that is "within one hundred (100) feet of an exterior wall or entryway of a health care facility." § 23-10.1(B)(1). "Demonstration activity," as defined by the ordinance, "includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities." § 23-10.1(B)(2). The ordinance also defines "[h]ealth care facility" and specifies how to measure the eight-foot distance. § 23-10.1(B)(3) and (C).



Other jurisdictions have adopted somewhat similar measures. See, *e.g.*, Santa Barbara [CA] municipal Code ch. 9.99 (quoted in *Edwards v. City of Santa Barbara*, 883 F. Supp. 1379, 1394-95 (C. D. Cal.), vacated, 70 F.3d 1277 (9th Cir. 1995)); Colo. Rev. Stat. § 18-9-122, upheld in *Hill v. City of Lakewood*, 911 P. 2d 670 (Colo. Ct. App. 1995), petition for cert. filed, No. 95-1905 (May 24, 1996).

These legislative measures differ in significant respects both from each other and from paragraph 1(c) of the injunction at issue here. But the Court's decision on the constitutionality of paragraph 1(c) may influence litigation over legislative measures of this kind. For this reason, the Court may wish to reaffirm a central feature of its holding in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994)—that in reviewing injunctions like the one at issue here, the Court will engage in "a somewhat more stringent application of general First Amendment principles" than it does when it reviews generally applicable legislation. *Id.* at 2524. In other words, legislative measures containing restrictions comparable to paragraph 1(c) are to be judged by a more lenient standard than the Court will apply to paragraph 1(c) in this case.

Under *Madsen*, a general legislative enactment is judged according to the established standard "set forth in *Ward v. Rock Against Racism*, [491 U.S. 781 (1989)], and similar cases." 114 S. Ct. at 2524. That standard, as the Court said, is whether a measure is "narrowly tailored to serve a significant governmental interest." *Ibid.*, quoting *Ward*, 491 U.S. at 791, and citing *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). See also *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). In the case of an injunction, by contrast, the courts must pay more "close attention to the fit between the objectives of [the] injunction and the restrictions it imposes on speech." *Madsen*, 114 S. Ct. at 2525. The question

becomes "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Ibid.*

The Court in *Madsen* gave several reasons for using different standards. Perhaps most important, legislation, unlike an injunction, applies not to specific, identified persons, but to a wide range of individuals. This feature of legislation itself is a safeguard against threats to First Amendment interests. See 114 S. Ct. at 2524. The City of Phoenix's ordinance, for example, applies to all demonstrators at health care facilities. It applies no matter what the demonstrators' views are about abortion; it also applies to individuals who are demonstrating not about abortion but about the use of animals for medical experimentation, a physician's political activities, a labor dispute, the availability of alternative medicine, or any other subject. If a city council or state legislature, acting on such a broad-gauge basis, were to consider a measure that unduly limited speech, the many affected groups and individuals would be able to mobilize to defeat the measure in the legislative process. Thus general legislation comes with a built-in political check that helps ensure that the measure will not be too restrictive of free expression.

In addition, while an injunction is a means of resolving a dispute between particular parties, "[o]rdinances represent a legislative choice regarding the promotion of * * * societal interests." *Madsen,* 114 S. Ct. at 2524. That is, the range of social interests at stake when a city council or a state legislatiure acts is usually broader than the interests affected by an injunctive remedy afforded in a lawsuit between private parties. The legislative choice, reflecting as it does the judgment of elected representatives about the public interests at stake, is entitled to a high degree of deference.

In fact, the difference in the treatment of legislative and judicial restrictions on expression has roots that go



deeper than the decision in *Madsen.* While the Court in *Madsen* held that injunctions like the one at issue here are not "prior restraints" within the meaning of such cases as *New York Times Co. v. United States,* 403 U.S. 713 (1971), and *Vance v. Universal Amusement Co.,* 445 U.S. 308 (1980), see 114 S. Ct. at 2524 n.2, many of the reasons for the historical concern with prior restraints have to do with the differences between legislative measures and court orders.

For example, an individual has the option of violating a statute or ordinance and then defending a subsequent prosecution on the ground that the measure is unconstitutional. That option is ordinarily unavailable when a person wishes to challenge the constitutionality of an injunction. See, *e.g., GTE Sylvania, Inc. v. Consumers Union,* 445 U.S. 375, 386-87 (1980); *Walker v. City of* Birmingham, 388 U.S. 307 (1967). In some circumstances at least, private parties may initiate civil contempt proceedings against persons who violate an injunction; by contrast, the enforcement of a statute or ordinance rests with public officials. That provides an extra check on excessive interference with expression. Moreover, a person charged with violating a legislative enactment is ordinarily entitled to a trial by jury—historically an especially important right in the protection of freedom of expression. See Leonard W. Levy, Emergence of a Free Press 37-44 (1985) (describing jury nullification in trial of John Peter Zenger). Civil contempt proceedings can be tried without a jury. For all of these reasons as well, it is appropriate to apply a less restrictive standard to legislative enactments.

Perhaps the most basic reason to apply different standards to legislative enactments and judicial decrees, however, is that the legislative and judicial processes are themselves fundamentally different. The Court's holding in *Madsen* that different standards apply to legislation and injunctions rests in part on these differences, "quite apart from First Amendment considerations" (114 S. Ct. at

2525). An injunction is based on adjudicative proceedings focused on the conduct of the specific individuals named in the injunction. It is therefore reasonable for the Court to pay more "close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech" (*ibid.*) and to expect an injunction to be "tailored by a trial judge to afford more precise relief than a statute" will ordinarily afford. *Id.* at 2524.

But a legislature, unlike a court, is not limited to remedying specific violations that have been proved in an adjudicative proceeding. It is not required to base its actions on findings of fact about the precise problem its legislation seeks to remedy. See, *e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986). Elected representatives are entitled to draw on a wider range of sources of information, not all of which can be reduced to an evidentiary record. This is precisely the legislative body's comparative advantage—its "informed acquaintance with local conditions to which the legislation is to be applied." *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 510 (1937). For these reasons, the requirement that *Madsen* imposed on court orders limiting expressive activity—a close nexus between a specific condition requiring a remedy and the specific prohibition chosen to remedy it—is simply not appropriate in the case of a city ordinance or other general legislative measure.

## II. THE REQUIREMENT THAT PETITIONERS MOVE A SHORT DISTANCE AWAY FROM AN INDIVIDUAL TO WHOM THEY ARE SPEAKING, UPON A SPECIFIC REQUEST BY THAT INDIVIDUAL, DOES NOT VIOLATE THE FIRST AMENDMENT.

Judged by the standard appropriate to injunctive remedies, the requirement of paragraph 1(c) does not violate the First Amendment. Under *Madsen*, of course, the constitutionality of paragraph 1(c) depends on an assessment of the specific facts in the record. But many of the arguments advanced by petitioners and their supporting amici suggest that the concept underlying paragraph 1(c) and similar legislative measures—a requirement that demonstrators move a short distance away from an individual who asks them to do so—necessarily raises serious questions under the First Amendment. This suggestion is entirely incorrect.



A. 1. In *Rowan v. United States Post Office*, 397 U.S. 728 (1970), the Court unanimously upheld the constitutionality of a statute providing that any persons who object to mailings from a particular sender can insist that the sender remove their names from all of its mailing lists and refrain from mailing them any materials in the future. See *id.* at 732-35; 39 U.S.C. § 3008. The Court acknowledged that this statute would restrict expression to some degree: "To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider." 397 U.S. at 736. Nonetheless, the Court held, the statute was constitutional because "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit" (*id.* at 737.)

*Rowan* relied in part on *Martin v. City of Struthers*, 319 U.S. 141 (1943), where the Court, speaking through Justice Black, invalidated a municipal ordinance that forbade the door-to-door distribution of literature but explicitly ruled that "[a] city can punish those who call at a home in defiance of the previously expressed will of the occupant" (*id.* at 148). The Court explained that "[t]his or any similar regulation leaves the decision as to whether distribut[o]rs of literature may lawfully call at a home where it belongs—with the homeowner himself." *Ibid.*

The same principles control this case. Like the measures upheld in *Rowan* and approved in *Martin*, paragraph

1(c) leaves speakers free to approach, and speak to, whomever they please. Paragraph 1(c) merely ensures that an unwilling target of such expressive activity will have some way to avoid being relentlessly subjected to it. "If [such a] prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan*, 397 U.S. at 738. As the Court has recently reaffirmed, the government's interest in prohibiting "speech directed primarily at those who are presumptively unwilling to receive it" is not only permissible under the First Amendment; it is "substantial and justifiable." *Frisby v. Schultz*, 487 U.S. at 488.

In fact, on any plausible scale of First Amendment values, the constitutionality of paragraph 1(c) follows *a fortiori* from the principle recognized in *Rowan*. Unwanted mail is far less intrusive than speakers who position themselves literally inches from an individual and refuse to move away when asked to do so. If the government may protect the interest in being free from unwanted mail, even though such mail can be immediately discarded, then surely it may protect individuals' interest in having people who confront them on the street back off a few paces.

On the other side of the ledger, the statute upheld in *Rowan* barred a speaker from using a very important medium of communication—the postal system—to reach any addressee who objected to even one of the speaker's mailings. Such a restriction has a far more dramatic effect on speech than a measure like paragraph 1(c). Measures like paragraph 1(c) do not bar any communication from any speaker to any recipient; they simply require that the speaker not stand physically close to an individual who explicitly indicates that that is her wish.[2]

[2] In addition, unlike paragraph 1(c) and similar measures, the statute upheld in *Rowan* was, in an important respect, content-based. The *Rowan* statute provides that the Postal Service will order a sender to remove an addressee from its mailing list if the addressee "in his sole discretion believes" that a "pandering advertisement" received from that sender was "erotically arousing or sexually provocative." 39 U.S.C. § 4009(a) (1964 ed., Supp. VI), quoted at 397 U.S. at 730; see 39 U.S.C. 3008(a). While an addressee's decision to terminate mailings is not reviewed by any government official, see 397 U.S. at 739 n.6—so in practice addressees can terminate mailings for any reason they wish—the statute still requires addressees to conclude that the materials were "erotically arousing or sexually provocative." Some addressees might refuse to invoke such a statute if their objection to the material rested on other grounds.

Paragraph 1(c) does not have this content-based character. It permits individuals to rebuff petitioners and their co-defendants for any reason whatever. In this respect, too, the constitutionality of paragraph 1(c) follows *a fortiori* from *Rowan*.



2. Petitioners and some amici seek to draw a sharp distinction between speech that enters the home and speech in public places, asserting that measures like paragraph 1(c) are acceptable only to protect the heightened privacy interests present in the home. See, *e.g.*, Pet. Br. 42; AFL Am. Br. 28; Fam. Res. Coun. Am. Br. 10-13.[3] It is true, of course, that the Court has recognized the strength of the interest in protecting the home against unwanted intrusions. See, *e.g.*, *Frisby*, 487 U.S. at 484-85. But paragraph 1(c) hardly protects patients seeking access to health care facilities from all unwanted intrusions. They can be approached by any two individuals, who can continue to speak to the patients until the patients affirmatively object. Even then, a patient can be subjected to shouting, chanting, jeering, and the waving of placards by large crowds of people, all directed specifically at the patient, from as close as fifteen feet

[3] "AFL Am. Br." refers to the brief of the American Federation of Labor and Congress of Industrial Organizations as amici curiae. "Fam. Res. Coun. Am. Br." refers to the amicus curiae brief of the Family Research Council, "FL ACLU Am. Br." refers to the brief filed by the American Civil Liberties Union of Florida, et al., as amici curiae.

away. Any of these activities could obviously be banned in or even near a home. See *Frisby*, 487 U.S. at 486-87. Therefore it cannot possibly be said that respondents, in defending the constitutionality of paragraph 1(c), are trying to extend to public places the standards that should apply only to the home.

There is an even more important error in petitioners' argument, however. A principal reason that the Court has extended a broader protection to speech in public places is, as the Court has repeatedly said, that when individuals are in public places they can ordinarily avoid any speech that they find objectionable. For example, in *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975), the Court struck down an ordinance that forbade drive-in movie theaters from showing films that displayed nudity on a screen visible from a public place. But in explaining why the ordinance "cannot be justified as a means of preventing significant intrusions on privacy," the Court noted that "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'" *Id.* at 212 (citation omitted). The ordinance was unconstitutional, the Court stated, because it "seeks only to keep these films from being seen from * * * places where the offended viewer readily can avert his eyes." *Ibid.* Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), where the Court overturned the conviction of a person who displayed a vulgar political slogan on a jacket he wore in a courthouse, the Court, in responding to the argument that the speech was being forced on an unwilling audience, stated that "[t]hose in the * * * courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21. See also *Spence v. Washington*, 418 U.S. 405, 412 (1974).

*Cohen* and *Erznoznick*, of course, invalidated measures that were, unlike paragraph 1(c), based on the content of expression. See 403 U.S. at 18; 422 U.S. at 211-12.



Even so, the Court was careful to note, as a predicate for invalidating the measures, that it was possible for viewers to minimize their exposure to the expression if they found it objectionable. In cases involving non-content-based regulation of expression, even in the most public of places, the Court has even more vigorously protected the interest in allowing people to avoid speech if they so choose.

For example, *Schneider v. State*, 308 U.S. 147 (1939), invalidated a ban on handbilling in the streets; but as the Court has recently emphasized, "[i]n *Schneider* * * * we spoke of a right to distribute literature only 'to one willing to receive it.'" *Frisby*, 474 U.S. at 485, quoting *Schneider*, 308 U.S. at 162. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion); *id.* at 307-08 (Douglas, J., concurring). In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court, while invalidating the convictions of civil rights demonstrators, went out of its way to emphasize that "[a] group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations." *Id.* at 555. See also *Cameron v. Johnson*, 390 U.S. 611, 616-17 (1968). This is, in substance, exactly the "right" on which petitioners "insist" here: the right to force any individuals who wish to enter a health care facility to "listen to their exhortations" face-to-face.

Finally, in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), the Court upheld a ban on face-to-face solicitation in airports, citing, among other things, the difficulty that the targets of such solicitation will have in disentangling themselves from the solicitors (*id.* at 683-84) and the "risks of duress" (*id.* at 684) —among them, the risk that the solicitor "will target the most vulnerable" (*ibid.*)—as well as the danger of "'intimidati[on]'" (*id.* at 689 (O'Connor, J., concurring), citing *United States v. Kokinda*, 497 U.S. 720, 734-34 (1990) (plurality opinion); see also 505 U.S. at 705

(Kennedy, J., concurring). If solicitation can be banned in a place where there is no reason to believe that any particular target will be especially vulnerable or will find the solicitation unwelcome, then surely the conduct in which petitioners wish to engage—approaching individuals whom they know to be highly vulnerable, and who have explicitly indicated that their approach is unwelcome—can also be banned.

In fact, the dissenters in *Lee*, who would have invalidated the ban on solicitation, explained that they discounted the risk of coercion or intimidation precisely because the targets of the solicitation retained the ability to escape from the solicitor. "While a solicitor can be insistent, a pedestrian * * * can simply walk away or walk on." 505 U.S. at 713 (Souter, J., dissenting). In contrast, a target of petitioners' speech cannot "walk away" if petitioners have, as they contend, a constitutional right to remain in close proximity to her the entire time she is on public property. Whatever the merits of bans on solicitation in various contexts, this should leave no doubt about the general validity of measures like paragraph 1(c); they are designed to preserve precisely the right of the target of a speaker's aggressive behavior to "walk away" from the speaker.

B. 1. Petitioners further assert that paragraph 1(c) is invalid because it constitutes an "audience veto" (*e.g.*, Pet. Br. 38-39). This argument rests on a simple misunderstanding of the Court's decisions. The Court has ruled that the hostility of some members of a speaker's audience is generally not a reason to restrict a speaker's ability to reach *other* members of the audience, or members of a broader audience. The Court has never suggested that there is a right to persist in forcing speech on the very listeners who do not want to be subjected to it.

For example, in *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992), the case on which petitioners principally rely, the Court invalidated an ordinance that imposed a fee on demonstrators who used public property. The Court noted that the amount of the fee depended on the extent to which the demonstrators would need protection from a hostile audience. *Id.* at 134-36 & n.12. Speakers who "wish[ed] to express views unpopular with bottle-throwers" would therefore face greater financial burdens if they wanted to reach any audience at all. *Id.* at 134.



It is in this sense that a "heckler" may not "veto" a person's speech: a heckler's opposition may not ordinarily be the reason to restrict the speaker's ability to reach others. See, *e.g.*, *Cohen*, 403 U.S. at 23; *Feiner v. New York*, 340 U.S. 315, 325-27 (1951) (Black, J., dissenting); *Terminiello v. Chicago*, 337 U.S. 1 (1949).[4] But of course paragraph 1(c) does not restrict speech in this way. Paragraph 1(c) does not have the slightest effect on petitioners' ability to reach a willing audience. In fact, paragraph 1(c) leaves petitioners free to speak to anyone they like, in any way they like, except for face-to-face confrontations with a specific individual who has specifically requested them to move away. Even then, petitioners may continue to speak to that individual from a reasonable distance. There is no "veto" of anyone's speech—only of physically confrontational tactics.

2. Similarly, petitioners and some amici cite this Court's statements to the effect that "citizens must tolerate

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[4] In fact, no case demonstrates more clearly the weakness of petitioners' contention than the seminal "hostile audience" decision, *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Cantwell, a religious proselytizer, requested permission before playing a phonograph record to passers-by on the street; when his audience was offended by the message, and told Cantwell so, Cantwell promptly stopped playing the record and moved on. *Id.* at 302-03, 308-09 (1940). The Court, in overturning Cantwell's conviction for breach of the peace, specifically noted: "we find only an effort to persuade a *willing* listener to buy a book or to contribute money" (*id.* at 310; emphasis added).

insulting, and even outrageous, speech." *Boos v. Barry*, 485 U.S. 312, 322 (1988). See, *e.g.*, AFL Am. Br. at 14; see also Pet. Br. 38; FL ACLU Am. Br. 13. The dissenters in the court of appeals asserted, in the same vein, that the emotional harm that petitioners would inflict on patients trying to enter the clinics "is an inevitable cost of free expression under the First Amendment." Pet. App. A-65. But the cases on which petitioners rely, including *Boos*, involved content-based laws in which the *government* made the determination which speech was unacceptably "insulting" or "outrageous." See, *e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *City of Houston v. Hill*, 482 U.S. 451, 459-60, 462-63 (1987); *Boos*, 485 U.S. at 318-21; *Cohen v. California*, *supra*.[6]

As the Court has repeatedly emphasized, what makes these cases troubling from the point of view of the First Amendment is precisely that it is the government—not

[6] The single case cited for this point by petitioners and their supporting amici that involved a non-content-based restriction was *Madsen*, which we discuss at pages 21-23 below.

One of the amici, somewhat oddly, places a great deal of emphasis on *City of Houston v. Hill*, *supra*. See AFL Am. Br. 15-17. We note that the facts of *Hill*, recounted at length in the amicus brief (Br. 15), not only bear little resemblance to what is at issue here but were not the basis for the Court's ruling in *Hill*; the Court expressly declined to decide "whether the ordinance has been unconstitutionally applied to Hill." 482 U.S. 458 n.6. The Court decided the case on overbreadth grounds. *Id.* at 467. (Amicus also inaccurately states that the Court overturned Hill's conviction. Br. 16. Hill was acquitted, not convicted, and brought suit to enjoin the enforcement of the ordinance. 482 U.S. at 454, 455.) In any event, the Court made it plain in that case that the fatal constitutional defect in the Houston ordinance was that it restricted speech with a certain content. See 482 U.S. at 460-62. In fact, the Court went out of its way to say that a municipality could prevent conduct comparable to the behavior that paragraph 1(c) enjoins. See, *e.g.*, 482 U.S. at 462 n.11, quoting *id.* at 479 (Powell, J., concurring in part and dissenting in part).



the individual—that is determining that the speech is unacceptably offensive. See, *e.g.*, *Boos*, 485 U.S. at 319; *City of Houston*, 482 U.S. at 466-67; *Erznoznick*, 422 U.S. at 210. A government decision of this kind creates the risk that government officials' own disagreement with the speech, or their desire to suppress the message that it conveys, influenced their decision. See, *e.g.*, *Hustler Magazine*, 485 U.S. at 55; *Cohen*, 403 U.S. at 21.

By contrast, a measure like paragraph 1(c) does not rest on any assessment by government officials of the value of speech with a certain content. Paragraph 1(c) reflects only a determination that allowing demonstrators to insist on confronting their targets face-to-face, when a targeted individual specifically objects, creates an impermissible danger of intimidation and harassment. That determination—amply supported by the record in this case—does not present the danger that government officials' evaluation of the speech will impermissibly affect their decision. The individual targets, not the government, undertake the evaluation.

Paragraph 1(c) also rests on the judgment that individuals seeking health care should be allowed a small degree of breathing room so that they might distance themselves slightly from highly intrusive behavior. See *Madsen*, 114 S. Ct. at 2528, quoting *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783-84 n.12 (1979); cf. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). The government should not ordinarily be in the business of deciding which speech is too offensive or objectionable. But it does no such thing when, as here, it merely makes it possible for certain especially vulnerable classes of people to have a minimal chance to avoid what they find to be highly intrusive conduct by speakers.

C. Finally, petitioners rely (Pet. Br. 34-38) on a portion of *Madsen* that invalidated a provision of the injunction at issue there. That provision of the *Madsen* injunction forbade persons from "physically approaching any

person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." 114 S. Ct. at 2529. There are, however, many differences between the provision invalidated in *Madsen* and paragraph 1(c). The *Madsen* injunction extended 300 feet from the clinic. See 114 S. Ct. at 2529. The injunction in this case permits petitioners to approach as close as fifteen feet from the entrances to clinic buildings and parking lots. See Pet. App. A-34. In addition, the terms of the *Madsen* injunction were significantly more vague than those of paragraph 1(c). For example, the *Madsen* injunction, instead of specifying precise distances, prohibited the defendants from "physically approaching" persons seeking access to the health care facilities. 114 S. Ct. at 2529.

Perhaps most important, the injunction in *Madsen* forbade communication altogether with any person who did not consent in advance. Paragraph 1(c) does not do this; instead, it places the burden on the targets of petitioners' activities to indicate their desire that petitioners move away. Paragraph 1(c), unlike the *Madsen* injunction, has no application at all until the targets of petitioners' activities so indicate. Petitioners belittle this distinction (see Pet. Br. 36-37), but the Court's decisions do not; indeed they have emphasized its importance. The contrast between *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Rowan v. United States Post Office*, *supra*, illustrates this point. Both cases involved statutes that had the effect of forbidding certain mailings unless the addressee assented. In *Bolger* the mailings were commercial advertisements, which are, of course, lower-value speech. See 463 U.S. at 65-68. The statute in *Rowan* applied to high-value speech. One would therefore expect the *Bolger* statute to have received a more favorable reception.

But the Court invalidated the statute in *Bolger* and upheld the statute in *Rowan*. The crucial distinction was precisely the difference between the injunction in *Madsen*



and paragraph 1(c). The statute in *Bolger* forbade the mailings unless the recipient consented, while in *Rowan* the mailings could continue until the recipient affirmatively objected. *Bolger* distinguished *Rowan* precisely on this ground: *Rowan*, the Court noted, involved "addressees [who had] give[n] notice to a mailer that they wish[ed] no further mailings" (463 U.S. at 72). The same distinction—between unsolicited approaches and approaches that have been specifically rebuffed—distinguishes this case from the portion of *Madsen* on which petitioners rely.

D. For all of these reasons, a measure that requires demonstrators to withdraw from close contact with an individual who so requests is not problematic under the First Amendment. It does not follow, of course, that paragraph 1(c) is necessarily constitutional; under *Madsen*, respondents must show the requisite connection between petitioners' conduct and the injunction.

The record in this case, however, seems to leave little doubt that a remedy like paragraph 1(c) is appropriate. The so-called "counselors" named in the injunction have a history of "harassing, badgering, intimidating and yelling at * * * patients" (Pet. App. A-10), even after the patients ask to be left alone. Indeed, some of these "counselors" have been convicted of harassing behavior but have continued to engage in the same practices. *Id.* at A-11. In these circumstances the district court was surely justified in concluding—as the court of appeals ruled, by a lopsided majority—that petitioners' future "counseling" activities would present a serious risk of the kind of harassing and intimidating conduct that the First Amendment unquestionably does not protect.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 1, 1996

No. 95-1065 (15)

Supreme Court, U. S.
FILED
JUN 23 1996
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK, *et al.*,

*Petitioners,*

—v.—

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,

*Respondents.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI* [1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, nonprofit organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates.

The ACLU was founded in 1920. For more than 75 years, it has steadfastly defended the First Amendment rights of unpopular speakers and has appeared before this Court in numerous First Amendment cases arguing against unjustified restrictions on speech. Most notably, the ACLU served as counsel in *Hague v. CIO*, 307 U.S. 496, 515 (1939), which first articulated the principle that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

For more than three decades, the ACLU has also been in the forefront of the battle for reproductive rights. In 1971, the ACLU served as counsel in *United States v. Vuitch*, 402 U.S. 62 (1971), the first abortion case argued in this Court. Three years later, the ACLU established its Reproductive Freedom Project. Since then, the ACLU has participated in virtually every major abortion case in this Court either as direct counsel or as *amicus curiae*.

This case, of course, involves the right to protest outside abortion clinics. It has therefore been cast by some as a clash between the First Amendment and reproductive rights. The ACLU believes that dichotomy is a false one

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

and that the proper resolution of the case must preserve *both* rights. To that end, we respectfully submit this brief in the hope of assisting the Court in drawing the proper constitutional lines.

The American Jewish Congress is a national organization of American Jews founded in 1918 and committed to the preservation of the civil liberties and civil rights of Jews and of all Americans. The American Jewish Congress has filed many briefs in this Court supporting First Amendment rights and free expression. In addition, the American Jewish Congress believes that a woman's freedom to choose whether, when, or if to bear children, and to obtain medical and counseling services in connection with that freedom, must and should be protected as an essential constitutional liberty. The American Jewish Congress believes that the injunction at issue, which establishes content-neutral regulations for anti-choice demonstrations, appropriately respects the free speech rights of such demonstrators while protecting women's freedom of reproductive choice.

The American Jewish Committee is a national organization of 50,000 members, founded in 1906, for the purpose of protecting the civil and religious rights of Jews. The American Jewish Committee believes that this goal can best be accomplished by preserving the constitutional rights of all Americans, including the fundamental right of access to abortion, as set forth in *Roe v. Wade*, 410 U.S. 113 (1973). Concerned as we are with free speech, the American Jewish Committee believes that harassment is not protected speech under the First Amendment.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms, the constitutional right to privacy, and women's rights to reproductive choice. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide.



People For has frequently represented parties and filed *amicus curiae* briefs before this Court in litigation seeking to defend free expression as well as litigation protecting reproductive freedom. Despite the claims of petitioners and their *amici*, People For believes that these interests can both be protected in this and similar cases and that, based on the record below, the type of injunctive relief entered here narrowly and properly restricts the conduct of parties who have repeatedly harassed and violated the rights of patients and clinic workers, while leaving those parties ample avenues for free expression.

## INTRODUCTION

This case arose following a series of mass blockades at reproductive health care facilities in upstate New York.[2] Petitioners do not defend the legality of those blockades. Nor do they defend their right to physically obstruct, harass, or intimidate medical patients and staff. Instead, petitioners would like to recharacterize their conduct in more traditional First Amendment terms. The record, however, contains numerous instances of these illegal activities, as both lower courts found.

Petitioners nonetheless challenge two provisions of a preliminary injunction that was issued by the district court

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[2] These facilities are sometimes referred to in the briefs as abortion clinics. In fact, several of the facilities offer comprehensive medical services. For example, plaintiff Alexander Women's Group is located inside Genesee Hospital, a full service acute care hospital in Rochester, New York.

only after lengthy hearings clearly demonstrated that an earlier temporary restraining order had failed to prevent the very activities that petitioners now concede are illegal.

The first provision prohibits demonstrations within 15 feet of the doorway or driveway of designated reproductive health care facilities, and of persons or vehicles entering or leaving those facilities. The second provision authorizes two "sidewalk counselors" to enter this "buffer zone" and engage in face-to-face communication with any person they choose. But, if the person they are addressing indicates a desire to be left alone, the "sidewalk counselors" must "cease and desist" and rejoin the other demonstrators 15 feet away.[3]

Petitioners contend that these provisions violate the First Amendment yet ignore the extensive factual record of obstruction, harassment and intimidation that made this injunction necessary. This Court should not be misled by that tactic. The First Amendment issues raised by this case cannot be resolved in a vacuum. To the contrary, a careful review of the facts is indispensable precisely because of the important First Amendment principles that petitioners have invoked.

## STATEMENT OF THE CASE

The plaintiffs in this case include several doctors, a pro-choice organization, and a group of health care providers who offer family planning, gynecological, and abortion services at their health care facilities, which are primarily lo-

[3] The full text of the preliminary injunction is set out as an appendix to the district court opinion. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1440-41 (W.D. N.Y. 1992)("*Pro-Choice I*"). The first challenged provision is §1(b) of the injunction; the second is §1(c).



cated in Buffalo and Rochester, New York. Plaintiffs filed their complaint on September 24, 1990, and simultaneously sought a temporary restraining order against a planned blockade that defendants had announced for September 28. Each of the individual named defendants had previously been arrested for illegal activities at one or more of plaintiffs' facilities.[4]

On September 26, 1990, the district court conducted an evidentiary hearing, and on September 27 issued the requested TRO. The TRO enjoined defendants from blockading plaintiffs' facilities and from "physically abusing or tortiously harassing" people entering or leaving those facilities. It also contained "buffer zone" and "cease and desist" provisions that were later modified at the preliminary injunction stage in response to evidence of inadequacies in the original order and that, as modified, are now before this Court.

Specifically, the TRO barred demonstrations within 15 feet of any person entering or leaving an abortion facility but did not create a buffer zone around the entrances or driveways of those facilities. Similarly, it allowed "sidewalk counseling" by two defendants subject to a cease and desist provision if the person being counseled "want[ed] to leave, or walk away." It did not, however, specify how far the "sidewalk counselors" must then back off.[5]

[4] For example, Paul Schenck, one of two petitioners in this Court, was arrested and convicted on three occasions. One of those convictions was for chaining himself to other named defendants inside a Buffalo abortion facility. *See* Second Amended Complaint, ¶17. The second petitioner in this Court, Dwight Saunders, was arrested and convicted for participating in a 1989 blockade at another Buffalo abortion facility. *Id.* at ¶20.

[5] The full text of the TRO is set out in the Second Circuit's *en banc* opinion. *Pro-Choice Network v. Schenck*, 67 F.3d 377, 382 n.1 (2d Cir. 1995)("*Schenck*").

Defendants initially complied with the TRO and conducted a peaceful demonstration rather than a blockade on September 28, 1990. Unfortunately, defendants' compliance with the TRO lasted only about a month.[6] While they did not resume their earlier blockading tactics, defendants again began to congregate in the entrances and driveways of abortion facilities in large numbers, preventing automobiles from entering or in some cases even finding the driveways. They also, in the guise of "sidewalk counseling," surrounded and harassed people entering and leaving the facilities.[7]

The preliminary injunction hearing spanned 11 days in March and April 1991. In granting the injunction, the district court considered additional evidence introduced at five contempt hearings held in 1991. Based on this evidence, the district court found that defendants were continuing to engage in what the district court described as "constructive blockades." Although defendants no longer barricaded entrances or chained themselves inside abortion clinics, they still crowded cars, screamed, pushed, grabbed, and generally "forc[ed] patients to run a gauntlet of harassment and intimidation in the hope that the patients [would] turn away before entering" plaintiffs' clinics. *Pro-Choice I*, 799 F.Supp. at 1424.[8]

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[6] Defendants consented to a continuation of the TRO pending a final decision on plaintiffs' preliminary injunction motion. *Pro-Choice I*, 799 F.Supp. at 1423.

[7] The resumption of these activities is described in the testimony of several witnesses during the preliminary injunction hearing. *See, e.g.*, Tr. 64-66 (Helen Dalley); Tr.177-78 (Deborah Warnes); Tr.283, 357 (Elizabeth Sholes); Tr.540 (Marilyn Buckham).

[8] It is abundantly clear in both the district court opinion, *Pro-Choice I*, 799 F.Supp. at 1424, and the Second Circuit's *en banc* opinion, *Schenck*, 67 F.3d at 383, that the term "constructive blockade" refers to physically aggressive and constitutionally unprotected conduct of the sort described (continued...)



According to the district court, "[d]emonstrators frequently and routinely congregate[d] in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities." *Id.* They "crowd[ed] around people trying to enter the facilities in an intimidating and obstructing manner, and grab[bed], push[ed] and shove[d] the patients, patient escorts and staff." *Id.* In addition, the district court found that "sidewalk counselors" "harass[ed], badger[ed], intimidat[ed] and yell[ed] at the patients and patient escorts in order to dissuade them from entering" the clinics. *Id.* at 1425. Moreover, they "continue[d] to do so even after the patients and patient escorts signal[led] their desire to be left alone." *Id.*[9]

Not surprisingly, the district court found that these activities impeded the movement of pedestrian and vehicular

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[8] (...continued)
above. It does not refer to the persuasiveness or effectiveness of petitioners' constitutionally protected speech. In that sense, the term "constructive blockade" is an unfortunate one. Obstruction, harassment and intimidation can be characterized as a "constructive blockade" only in comparison to defendants' even more extreme activities that literally shut the clinics down.

[9] In light of these findings, the district court's statement that defendants' "demonstrations are usually peaceful in nature," *id.* at 1423, must be placed in context. A nonviolent demonstration can still cross the line from constitutionally protected protest to unprotected harassment, intimidation and obstruction. For example, one witness testified that "counselors" would sometimes follow patients for "several hundred feet along sidewalks or through parking lots," often "pushing, shoving, grabbing," or causing other "fairly serious bodily contact . . . forcing patients to run a kind of gauntlet . . . ." Tr.263-64 (Elizabeth Sholes). The same witness described the "sidewalk counseling" experience in these terms: "It's pretty vehement, and it's very scary. The content of the message is not even the issue. It's the sheer proximity of total strangers getting in your path . . . and the whole thing is very frightening." Tr.301.

traffic, and that such activity seriously jeopardized the health and safety of clinic patients and staff. In particular, "[t]he presence of numerous demonstrators in the driveway entrances intimidate[d] and impede[d] the drivers of cars seeking access to the parking lots of the facilities and create[d] a danger both to the occupants of the cars and the demonstrators themselves." *Id.* at 1424. Also, the district court found that defendants' "activity cause[d] stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupt[ed] the atmosphere necessary for rendering safe and efficacious health care." *Id.*

As the district court recognized, these problems are especially acute in this context because of "uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety." *Id.* at 1427. "Often times" this heightened anxiety required patients to reschedule their abortion procedures. "This delay can [also] increase the risks associated with an abortion." *Id.*[10] Finally, the district court found that "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Id.* at 1426.

The preliminary injunction issued by the district court responded to these very specific findings. It adopted the

[10] As the district court explained: "For some women who elect to undergo an abortion, clinical medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded, or if she becomes so distressed by the 'sidewalk counselors' that she cannot undergo surgery, the above-mentioned complications may result." *Id.*



terms of the TRO with three important modifications. It added a 15-foot buffer zone around clinic driveways and entrances in response to evidence that the TRO had not succeeded in keeping the driveways and entrances clear for ingress and egress. It provided that "sidewalk counselors" who are told to back off must rejoin the other demonstrators 15 feet away in response to evidence that the more ambiguous cease and desist provision in the TRO had not succeeded in curbing harassment by "sidewalk counselors." And it elaborated on the ban against tortious harassment in the TRO by prohibiting "sidewalk counselors" from "grabbing, touching, pushing, shoving or crowding persons entering or leaving" abortion clinics, all of which had been revealed in the record.

Only two of the fifty named defendants appealed to the Second Circuit. The original panel unanimously upheld most of the provisions of the preliminary injunction. However, by a 2-1 vote, the panel struck down the 15-foot buffer zone around clinic entrances and clinic patients, as well as the cease and desist provision applicable to "sidewalk counselors." *Pro-Choice Network v. Schenck*, 67 F.3d 359 (2d Cir. 1994).

The portion of the panel decision invalidating these two provisions was then reversed in a 13-2 *en banc* opinion.[11] *Schenck*, 67 F.3d 377. The principal opinion for the court was written by Judge Oakes and signed by nine members of the Second Circuit. Applying the test announced by this Court in *Madsen v. Women's Health Center*, 514 U.S. __, 114 S.Ct. 2516 (1994),[12] the *en banc* court concluded that

[11] The only two dissenting votes were cast by the majority members of the original panel whose decision was overruled.

[12] The district court did not have the benefit of this Court's opinion in

(continued...)

both challenged provisions were content-neutral and restricted "no more speech than was necessary" to serve the significant governmental interests in medical safety, public safety and access to abortions. *Schenck*, 67 F.3d at 387.

In reviewing the buffer zone, Judge Oakes emphasized that demonstrators "can still picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by." *Id.* at 389. Furthermore, Judge Oakes noted, the ability of two "sidewalk counselors" to approach persons on an individualized basis "ensures that the injunction does not hamper [defendants'] message, only its intimidating method of demonstration." *Id.*

Likewise, Judge Oakes concluded that the cease and desist provision was not designed "to suppress speech because of the anxiety its content produces in its audience . . . but rather to provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators." *Id.* at 391-92.

Echoing this approach, Judge Winter's concurring opinion, signed by ten members of the Second Circuit, stressed that "the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs." *Id.* at 394. Judge Meskill's dissent described this principle as "unassailable." *Id.* at 408. His disagreement with the majority dealt much more with the majority's characterization of the record than with its characterization of the law.

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[12] (...continued)
*Madsen* when it issued the preliminary injunction. Its analysis of the preliminary injunction as a time, place and manner restriction was consistent with then prevailing law. *Pro-Choice I*, 799 F.Supp. at 1432-37.



## SUMMARY OF ARGUMENT

There is no dispute in this case about the governing legal standard, which was announced by this Court only two years ago in *Madsen*, 114 S.Ct. 2516. It is also undisputed that the Second Circuit applied the *Madsen* standard when it concluded that the challenged provisions of the preliminary injunction "burden no more speech than necessary to serve a significant government interest," *id.* at 2525.

Petitioners purport to be applying the *Madsen* standard, as well, in challenging the preliminary injunction. Ultimately, however, their argument rests on the untenable proposition that any injunction in this case that goes beyond a ban on trespass and harassment automatically burdens "more speech than necessary." That argument is flawed for at least three reasons.

First, it is inconsistent with *Madsen* itself, where this Court upheld an injunction that contained anti-trespass and anti-harassment provisions along with a 36-foot buffer zone. Second, it ignores extensive findings by the district court of physical obstruction, intimidation, harassment, crowding, grabbing, and screaming; of a continuation of these problems even after entry of the more limited temporary restraining order; and of the inability of the police to assure access to the clinics without some back-off provisions and a prophylactic buffer zone. Third, it mischaracterizes the significant state interest in this case, which is not merely about protecting the property rights of clinic owners but, even more significantly, about ensuring safe and unimpeded access to reproductive health services that have a constitutional status of their own.

To be sure, the *Madsen* standard is a serious one and ought to be seriously applied. Any injunction that distances protestors from the object of their protest raises profound constitutional issues under the First Amendment for all the

reasons that this Court articulated in *Madsen*. Indeed, the *amici* organizations that have joined in this brief are most often on the side of those challenging such restrictions. But it has never been the law that the First Amendment guarantees the right to protest in any manner one chooses, or to use the occasion of a protest to physically harass, intimidate or obstruct one's ideological opponents. To the contrary, this Court has repeatedly held that the First Amendment does not immunize otherwise unlawful conduct merely because the persons engaging in that conduct have an ideological motivation. *Wisconsin v. Mitchell*, 506 U.S. __, 113 S. Ct. 2194 (1993).

As petitioners correctly point out, even content-neutral injunctions against speech are disfavored. Petitioners also correctly note that any injunction impinging on speech, even indirectly, must be narrowly drawn and tailored to the particular circumstances. However, contrary to petitioners' argument, those principles cannot resolve this controversy unless they are grounded in the facts. Assessed in light of the facts, the preliminary injunction in this case burdens no more speech than necessary to achieve significant government interests.

It is important to remember that before this case began, plaintiffs were victimized by a series of mass blockades that severely disrupted reproductive health services in the area, and that even petitioners concede were clearly illegal. During the 18 months that the TRO was in place, clinic driveways and entrances continued to be blocked, and clinic patients and staff continued to be surrounded, followed, harassed, and obstructed.

Under these circumstances, the 15-foot buffer zone created by the preliminary injunction was a measured and incremental response to an ongoing problem that threatened the health, welfare and safety of patients, staff and demon-



strators. Like the buffer zone in *Madsen*, it was directed at the conduct of the protestors, not their message. Unlike *Madsen*, it left the protestors on the same side of the street as the clinics they were picketing. Thus, even more than in *Madsen*, the protestors' chants could still easily be heard and their signs could still easily be read.

Petitioners' challenge to the cease and desist provision is similarly misguided. *Amici* fully acknowledge and have frequently advocated the importance of face-to-face communication. But the right to engage someone on the street in a political dialogue does not include the right to crowd, surround, badger, and obstruct, which is how the district court described the behavior of the defendants in this case.

## ARGUMENT

### I. THE FIRST AMENDMENT PRINCIPLES THAT GOVERN THIS CASE ARE WELL-ESTABLISHED AND LEAVE AMPLE ROOM FOR PETITIONERS' POLITICAL PROTEST

Petitioners have presented this case as a basic test of the right to engage in political protest on the street. It is not. The preliminary injunction undeniably limits petitioners' ability to engage in the sort of obstruction, intimidation and harassment that the record reveals, but such unlawful activity has never been protected by the First Amendment, nor should it be. Petitioners have also suggested that, because this case involves abortion, First Amendment principles have been sacrificed on the altar of political correctness. That argument, too, is entirely without merit. Indeed, it is probably backwards. This preliminary injunction would not have aroused the same level of controversy if the defendants were white supremacists who had repeatedly engaged in similar acts of obstruction, intimidation and harassment directed at blacks trying to register to vote.

Stripped of its rhetoric, this case is much more about facts than law. The evidence that defendants have overstepped the bounds of lawful political protest is substantial. The evidence that defendants have been prevented from delivering their anti-abortion message is virtually non-existent. *Amici*'s view of the record, therefore, is very different from petitioners' view. By contrast, there is much less disagreement over the broad First Amendment principles that govern this case. It is nonetheless helpful to restate those principles because they necessarily shape the argument that follows.

Most fundamentally, petitioners' First Amendment right to demonstrate on the public streets is beyond dispute. That right has been recognized at least since *Hague v. CIO*, 307 U.S. 496, and is integral to our notions of democratic self-government. The right to protest on the public streets, moreover, cannot be limited or abridged because of the content of petitioners' message. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). In addition, petitioners have the right to convey their message to its intended audience, *see, e.g., Edwards v. South Carolina*, 372 U.S. 229 (1963), which in this case consists of clinic patients and staff.

Speech does not lose its First Amendment protection in a public forum because it is vituperative, *Terminiello v. Chicago*, 337 U.S. 1 (1949), or because it would be regarded as "offensive" by some, *Texas v. Johnson*, 491 U.S. 397 (1989), or because it seeks to "persuade to action, not merely to describe facts," *Thomas v. Collins*, 323 U.S. 516, 537 (1945). To the extent that Judge Winter's opinion below can be read to suggest that First Amendment speech should be judged by its effect on the "timid," *Schenck*, 67 F.3d at 396, we disagree. This Court has properly rejected broad restrictions on speech premised on the reaction of the most vulnerable audience. *Cf. Butler v. Michigan*, 352 U.S. 380 (1957).



On the other hand, the fact that one is engaged in expressive activity does not immunize otherwise unlawful activity. *Wisconsin v. Mitchell*, 113 S.Ct. 2194. Such unlawful activity may be enjoined. Still, any injunction limiting expressive activity raises serious First Amendment concerns, *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968), even if the restraint is content-neutral and the limitation on speech is incidental.

The question of how extensive the record of unlawful activity must be to justify an injunction inevitably depends on the seriousness of the unlawful activity and the scope of the injunction. Isolated, unlawful acts do not justify a broad injunction against speech, *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).[13] But this case involves neither isolated unlawful acts nor a broad injunction against speech. Rather, the challenged order was designed to protect ingress and egress from abortion clinics that had been repeatedly blocked, and to protect patients and staff that had been repeatedly harassed, over an extended period of time. Even under these circumstances, however, an injunction "must burden no more speech than is necessary," *Madsen*, 114 S. Ct. at 2525, to survive First Amendment scrutiny.

In making this judgment, the site of the protest may sometimes be relevant. What is permissible in a public park may not be permissible outside a school, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), or a medical facility.[14]

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[13] In stark contrast to the preliminary injunction here, the permanent injunction in *Claiborne Hardware* prohibited the NAACP from, *inter alia*, "picketing or patroling" any of plaintiffs' stores and from "persuading" customers not to patronize plaintiffs' businesses. 458 U.S. at 893.

[14] Contrary to the Ninth Circuit's view in *Sabelko v. City of Phoenix*, 68 F.3d 1169, 1172 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3625 (Mar. 5, 1996)(No. 95-1415), this premise does not lead to the

(continued...)

This regulatory principle is a limited one, however, and cannot be stretched to support the claim that speech is entitled to diminished constitutional protection whenever its message is targeted at specific individuals rather than at the public as a whole. As the AFL-CIO correctly points out in its *amicus* brief, First Amendment activity frequently relies on targeted speech in a variety of contexts from political protests to labor pickets to student demonstrations to civil rights boycotts. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 99 (1940).

As a matter of principle, therefore, we agree with the AFL-CIO that demonstrators should not be required to address the public as a whole if the object of their protest is more narrowly focused. But, unlike the AFL-CIO, we do not read Judge Winter's opinion as going so far. Rather, we read it as standing for the less troublesome proposition that physically "coercive and obstructionist" behavior, *Schenck*, 67 F.3d at 396, is more intimidating when directed at individuals than at a crowd, even in the context of a political protest. If our interpretation is incorrect, we share the concerns expressed by the AFL-CIO in its *amicus* brief.

Likewise, we agree with the AFL-CIO that individuals walking down the street should not be regarded as a "captive audience" for First Amendment purposes even if they are the intended targets of protest. Indeed, *amici* believe that there are significant dangers to applying the "captive audience" doctrine to a quintessential public forum. As this Court has often observed, all of us are subject to unwanted messages as soon as we venture outside our homes. *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970). But the

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[14] (...continued)
conclusion that the public streets outside a health care facility should no longer be regarded as a public forum. This Court's cases are clearly to the contrary. *E.g., United States v. Grace*, 461 U.S. 171 (1983).



fact that a message is unavoidable should not mean that it is inescapable. *Cohen v. California*, 403 U.S. 15, 21 (1971). The First Amendment protects listeners as well as speakers. The latter have a right to deliver their message; the former have a right to walk away without having to run a "gauntlet of harassment." *Pro-Choice I*, 799 F.Supp. at 1424.[15]

In short, *amici* do not endorse all of the Second Circuit's reasoning and language, particularly with regard to the captive audience doctrine and the significance of targeted protests. However, we continue to believe that the preliminary injunction issued by the district court is consistent with the First Amendment in light of this record and should be upheld.

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[15] When clinic patients and staff are physically prevented from "walking away" they are, in a very literal sense, "captives" of the hostile demonstrators who stand in their path. The 15-foot buffer zone imposed by the district court was a response to that problem. The buffer zone, however, does not prevent the demonstrators from delivering their message. Indeed, their continued ability to do so is critical to the First Amendment analysis in this case. The "captive audience" doctrine, by contrast, is designed to silence the message altogether out of respect for the listener's privacy interests. Thus, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), upheld a ban on all political advertising on city buses. Similarly, *Frisby v. Schultz*, 487 U.S. 474 (1988), upheld a ban on all residential picketing. Applying the "captive audience" doctrine to this case, as it was applied in *Frisby*, would mean that petitioners could not even engage in a silent vigil outside of the clinics. No one has sought that relief, and it would be indefensible under the First Amendment. For similar reasons, the notion that individuals can invoke the "captive audience" doctrine whenever "they have been sought out [by protestors] at a particular location they can avoid only at a cost," *Schenck*, 67 F.3d at 396, stretches the "captive audience" doctrine much too far. Among other things, it could be used to challenge every labor picket. This Court should not endorse that result, nor does this case require it.

## II. THE 15-FOOT BUFFER ZONE COMPORTS WITH THE CONSTITUTIONAL AND EQUITABLE STANDARDS SET FORTH IN *MADSEN*

### A. The Injunction Followed Extensive Evidentiary Hearings And Rested Upon Findings Of Obstruction, Harassment, Repeated Disobedience Of The Temporary Restraining Order, And Limited Capacity Of The Police To Maintain Unimpeded Access To The Clinics

Prior to issuing the injunction, the district court found that "[t]he demonstrators [would] crowd around people trying to enter the [health care] facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff." *Pro-Choice I*, 799 F.Supp. at 1424. It further found that "[d]emonstrators frequently and routinely congregate[d] in or near the driveway entrances to the parking lots in order to impede and obstruct access to the facilities," *id.*, and that "[o]n some occasions the drivers of and occupants of the cars trying to enter the clinic parking lots [were] so intimidated or confused by the demonstrators that they [left] the area thereby causing those occupants seeking health care to suffer a delay in obtaining such care." *Id.*

The record thus supported the district court's concern that a simple injunction directing defendants not to obstruct ingress to and egress from the medical facilities, as the TRO provided, was ineffective without the more specific protection of a buffer zone. *Id.* at 1434. Indeed, even before the events in question, the obstruction of vehicular or pedestrian traffic constituted a violation of New York Penal Law §240.20(5)(disorderly conduct). Yet neither this Penal Law provision nor the TRO deterred the obstructive activities of



defendants. Additionally, the district court found that "[l]ocal law enforcement ha[d] been unable to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Pro-Choice I*, 799 F.Supp. at 1426. The court noted that "[d]efendants participate[d] in their 'rescue' activities on a continual basis and the local police [did] not have the resources necessary to monitor the situation constantly." *Id.*

Finally, five of the individual defendants were adjudged by the district court to have violated the temporary restraining order. *Pro-Choice Network v. Project Rescue*, 828 F. Supp. 1018, 1028-29 (W.D.N.Y. 1993)("*Pro-Choice II*"). And, as the court further found, many of those associated with Project Rescue were "arrested on more than one occasion for harassment, yet persist[ed] in harassing and intimidating patients, patient escorts and medical staff." *Pro-Choice I*, 799 F.Supp. at 1425.

On the record, therefore, there was ample basis for the district court to conclude that its earlier, more general injunctive provisions were ineffective, and that the original 15-foot buffer around individuals (but not clinic and driveway entrances) had failed to stop these defendants from their physically obstructive and unlawful behavior.

### B. The Buffer Zone Provision Was Not Directed At The Content Of Petitioners' Speech

This Court has emphasized that injunctions directed at the content of expression bear a "heavy presumption of invalidity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and can only be sustained in the most "exceptional cases," *Near v. Minnesota*, 283 U.S. 697 (1931). In this case, however, the injunction is not directed at the content of petitioners' expression but at their obstructive behavior.

By its terms, the injunction does not focus on the content of petitioners' speech. And there is nothing in the record to suggest that, in issuing the injunction, the district court wished to suppress petitioners' message.[16]

As this Court explained in *Madsen*, in language that is equally applicable here:

> [T]he [trial] court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

114 S.Ct. at 2523-24 (emphasis in original).[17]

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[16] The cease and desist provision is also not the equivalent of a content-based "heckler's veto." *See* pp.28-29, *infra*.

[17] By contrast, the ordinance at issue in *Sabelko v. City of Phoenix*, 68 F.3d 1169, contains a "cease and desist" provision that applies to all persons engaged in "demonstration activity," regardless of whether they have engaged in prior unlawful conduct, but does not apply to anyone else. *Id.* at 1170 n.1. Thus, it is not a general harassment statute but, instead, an ordinance targeted specifically at protestors. Such selectivity in an ordinance raises serious issues of content discrimination under *Boos v. Barry*, 485 U.S. 312 (1988).



### C. The Buffer Zone Is Necessary Both To Ensure Access To The Health Care Facilities And To Protect The Health, Safety, And Reproductive Choices Of Women Undergoing Medical Treatment

The buffer zone order in this case rests upon three interests that this Court recognized as "significant" in *Madsen*. 114 S.Ct. at 2526. First, the district court and the court of appeals found the buffer zone necessary to ensure unobstructed physical access to the health care facilities. *Pro-Choice I*, 799 F.Supp. at 1433; *Schenck*, 67 F.3d at 389. Second, both the district and appellate courts concluded that the buffer zone was necessary to protect a serious and identifiable threat to the health and safety of women seeking medical treatment in these facilities. *Id.* Third, the provision was needed to ensure women's access to reproductive and family planning services, including abortion. *Madsen*, 114 S.Ct. at 2526.[18] On the record in this case, each of these interests can stand independently as "significant" justifications for the buffer zone requirement. In combination, they are more than "sufficient to justify an appropriately tailored injunction." *Id.*

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[18] Although this interest in reproductive choice represents, in some sense, a more particularized articulation of the interests in physical access to clinics and to a safe medical environment, the fact that the medical service at issue has specific constitutional protection adds weight to the reasons supporting the injunction. There is no question that there is a substantial, indeed a compelling interest in securing fundamental rights against coercive interference by private parties. *See Burson v. Freeman*, 504 U.S. 191, 198-99 (1992)(upholding 100-foot ban on electioneering outside of polling places because of history of intimidation); *see also* 42 U.S.C. §1985 (private conspiracies to deny civil rights can be redressed in an action for damages or injunctive relief).

As previously described, the record reveals that defendants' behavior seriously obstructed pedestrian and vehicular movement into and out of the health care facilities, *Pro-Choice I*, 799 F.Supp. at 1424; that such obstructive behavior -- consisting in part of surrounding women who were trying to enter and leave the clinics -- was so menacing that it jeopardized the health and safety of those women, *id.* at 1427; and that such obstructive and menacing behavior was so persistent that it required the creation of a pedestrian lane or buffer zone to allow persons and automobiles to enter and leave the clinics safely, *id.* at 1434.

Given the plain necessity for some sort of buffer zone in response to defendants' repeated unwillingness to cease their obstructive conduct in the absence of such a bright line, a 15-foot limit is hardly excessive. Significantly, petitioners have not identified even a single instance in which the 15-foot buffer zone will place them across the street from any of the clinics covered by the preliminary injunction. (This contrasts, of course, with the 36-foot buffer zone upheld in *Madsen*, which did place the demonstrators across the road from the clinic in that case.)

Petitioners criticize the "one-size-fits-all nature" of the 15-foot buffer zone. We agree that any injunction affecting speech must be tailored to the geography of the particular demonstration sites. Once again, however, petitioners' argument ignores the record. The 15-foot buffer zone was not created randomly or arbitrarily. Rather, the 15-foot distance was chosen to ensure a safe turning radius for cars entering driveways that had previously been overwhelmed by demonstrators, and to ensure safe passage for patients and staff arriving by foot who had previously been forced to walk a "gauntlet of harassment." *See* TRO Hearing, September 26, 1990. In choosing this distance as an appropriate one, the district court was fully aware that none of the demonstrators would be forced across the street at any of the sites involved



in this case.[19] Contrary to petitioners' assertion, therefore, the 15-foot buffer zone is site specific in this very practical and critical sense.[20]

### D. The Injunction Preserves Petitioners' Ability To Convey Their Message In A Meaningful And Effective Way

The 15-foot zone provides defendants with an opportunity to engage in a full range of expressive activity. Some representatives of the defendant organizations can engage in individualized, face-to-face communication with women entering the clinics in an effort to persuade them, on a personal level, that abortion is wrong. They can do so in immedi-

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[19] Diagrams of each of the clinic sites were included in the record at the preliminary injunction hearing.

[20] In addition to providing for a 15-foot buffer zone in front of the health care facilities, the injunction requires a floating 15-foot buffer zone around each "person or vehicle seeking access to or leaving" the clinics. Petitioners criticize the "floating buffer zone" on the ground that it fails to specify how far from a clinic a floating buffer zone may reach. Pet.Br. at 17. In a specific Statement of Clarification, the district court has already indicated that the "floating zone" would only apply "at the sites chosen for demonstrations," J.A.29, *i.e.*, in the immediate vicinity of the clinics. That limitation is sound, but still vague. The Second Circuit responded to this concern by suggesting that "[t]his is exactly the type of issue that is best left to case-by-case adjudication by the district court." *Schenck*, 67 F.3d at 389 n.4. Defendants, however, have a due process right to know in advance what conduct is proscribed by the preliminary injunction. *Amici* do not believe the Second Circuit's assurance that the district court "will apply a reasonable geographic scope to the phrase 'seeking access or leaving,'" *id.*, is sufficient. Since the Second Circuit has already ordered a remand, *id.* at 391, this Court should direct the district court to impose specific distances governing the reach of the "floating buffer zone" requirements at each facility.

ate proximity to the targets of their expression and without regard to the 15-foot buffer -- unless and until they are told that their continued presence is unwelcome. At the same time, others from the defendant groups can gather with like-minded individuals and stage a demonstration or carry placards at any location at least 15 feet from the clinics. In so doing, anti-choice activists can demonstrate, by the force of their numbers, how many people support their message. Moreover, inasmuch as these demonstrations or placard-carrying events can be held as close as 15 feet from the clinics, they remain well within sight and sound of the targets of the messages conveyed by the defendants. *See Madsen*, 114 S.Ct. at 2527 (one of the factors the Court considered in upholding a 36-foot buffer zone was that "[p]rotestors standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots").

For these reasons, the 15-foot zone is valid under the standard articulated by this Court in *Madsen*. The requirement rests on an ample record supporting its necessity. And, especially when read in conjunction with the provision allowing "sidewalk counseling," the injunction provides defendants with a full range of opportunities to engage in a variety of expressive activities at appropriate locations. So understood, the buffer zone cannot be found to "burden more speech than necessary."



## III. THE PROVISIONS OF THE INJUNCTION RELATING TO "SIDEWALK COUNSELING" COMPORT WITH THE APPROACH OF THE COURT IN *COHEN v. CALIFORNIA* AND, AS INTERPRETED BY THE SECOND CIRCUIT, SATISFY THE *MADSEN* STANDARD

As noted, §1(c) of the injunction allows for individualized, face-to-face communication between the defendants and those entering or leaving the targeted medical facilities. By permitting two "sidewalk counselors" to communicate directly with each patient, notwithstanding the 15-foot buffer zone, the injunction provides petitioners with a range of expressive opportunities.

Section 1(c) also provides, however, that a person who does not want to be counseled, "who wants to leave or walk away . . . shall have an absolute right to do [so] and in such event, the persons seeking to counsel that person shall cease and desist from counseling that person." As explained by the district court, this provision will only be enforced if the targeted person or group "indicates, either verbally or non-verbally, that they do not wish to be counseled . . . ." *Pro-Choice I*, 799 F.Supp. at 1434. Based on the record and as so construed, §1(c) was amply justified. The extensive evidence of harassment by "sidewalk counselors" supported the court's conclusion that without a specific back-off requirement these "counselors" would continue to crowd, follow, and otherwise harass clinic patients and staff.[21]

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[21] The court of appeals acknowledged the potential vagueness inherent in the text of §1(c) and directed the district court, on remand, to modify formally the language of the injunction to provide that the "cease and desist" requirement will only be triggered when the targets of "sidewalk counseling" "indicate[] either verbally or non-verbally that they do not

(continued...)

This Court has long recognized that there is no authority to silence a speaker merely because the expression may be distasteful to an unwilling listener or observer. *Cohen v. California*, 403 U.S. at 21; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). In *Cohen*, Justice Harlan carefully explored this issue and the competing societal concerns:

> [M]uch has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to [his] crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . . While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech" . . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

403 U.S. at 21 (citations omitted). Thus, the solution to the problem of unwanted expression offered by Justice Harlan in *Cohen* was that those offended by a particular statement "could effectively avoid further bombardment of their sensibilities simply by averting their eyes" and walking away. *Id.*

If the injunction in this case had prohibited representatives of Project Rescue from even approaching persons entering the clinics without permission on the theory that Project Rescue's message was objectionable to women who were seeking abortions, such a provision would have run afoul of the concerns articulated in *Cohen*. *See also Madsen*, 114 S. Ct. at 2529, *quoting Boos v. Barry*, 485 U.S. at 322. But the injunction here is not nearly so restrictive. It permits defendants to approach and communicate with those entering the medical facilities, even if their message is disagreeable to the clinics' patients and staff. However, the injunction provides that, when those who are personally confronted in a face-to-face physical encounter with "sidewalk counselors" indicate that they have heard enough and do not want to be "harass[ed], badger[ed], intimidate[d]" or surrounded by people yelling in their ear, *Pro-Choice I*, 799 F. Supp. at 1425, the "counselors" must stop their pursuit, back off, and return to the demonstration area or else approach a different person.

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[21] (...continued)
wish to be counseled." *Schenck*, 67 F.3d at 391. Although this modification represents a significant improvement in the text of the provision, *amici* believe that the provision should be further improved and any ambiguity in its operation additionally reduced by limiting it to circumstances where the target indicates verbally that she or he does not wish to be counseled. Such a modification would eliminate any potential misunderstanding created by nonverbal communication.

Petitioners continue to insist that "sidewalk counselors" should have no obligation to retreat even when requested to do so by an unwilling listener who is seeking to walk away. But petitioners fail to cite any case upholding the right to harass, intimidate or obstruct individuals walking down the street, for an entire city block, after they have asked to be left alone. At its heart, the "cease and desist" provision is directed at this sort of behavior. It is intended to permit individuals to follow Justice Harlan's suggestion in *Cohen* and walk away. Nothing in *Madsen* can fairly be read as deviating from the "walk away" approach urged by the Court in *Cohen*.[22]

Contrary to petitioners' claims, the "cease and desist" measure does not create a "heckler's veto" of the sort previously condemned by the Court. *See, e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992). A "heckler's veto" is an attempt to prevent a speaker from communicating with the public at large merely because one or more individuals are offended by the speaker's message. In this case, by contrast, the cease and desist provision merely permits patients and staff to walk away from a face-to-face confrontation with "sidewalk counselors" whose willingness to engage in acts of physical harassment and intimidation is

[22] *Madsen* involved a prohibition against *all* face-to-face uninvited speech. Although the *Madsen* Court recognized -- as did *Cohen* -- that "citizens must tolerate insulting and even outrageous speech," 114 S.Ct. at 2529, nothing in *Madsen* suggests that protestors can claim First Amendment protection when they surround or obstruct citizens trying to walk away from an unwanted message by proceeding unimpeded toward their intended destination.



amply demonstrated in this record.[23] The rebuffed "street counselor" is in no way prevented from communicating with the public or with other possibly more receptive recipients of his message. Thus, the "street counselor" can continue to communicate in the demonstration site area -- a mere 15 feet from the clinic entrance -- and can approach any other pedestrian. So understood, the "cease and desist" provision creates no more of a heckler's veto than does a person who refuses to accept an unwanted leaflet from a sidewalk pamphleteer or who hangs up the telephone in response to an unwelcome caller, or an individual who asks the post office not to deliver unwanted mail to her home. *See Rowan v. U.S. Post Office*, 397 U.S. at 736-37.

[23] The Second Circuit stressed that the cease and desist provision is intended to "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators," *Schenck*, 67 F.3d at 392, and "not . . . to suppress speech because of the anxiety its content produces in the audience." *Id.* at 391. This interpretation is consistent with the contempt proceedings brought under this provision. *E.g., Pro-Choice Network v. Walker*, 994 F.2d 989, 992 (2d Cir. 1993). Thus, we do not believe the cease and desist provision can fairly be construed, or has been applied, to prohibit a "sidewalk counselor" from politely and unobtrusively asking a patient to reconsider her initial refusal to talk. If there is any ambiguity in that regard, this Court can clarify it. It bears emphasis again, however, that this record does not reflect such innocent activity.

## CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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Dated: June 25, 1996

No. 95-1065

(16)

Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,

*Petitioners,*

—v.—

PRO-CHOICE NETWORK OF WESTERN NEW YORK, BUFFALO GYN WOMENSERVICES, P.C., ERIE MEDICAL CENTER, PAUL J. DAVIS, M.D., BARNETT SLEPIAN, M.D., MORRIS WORTMAN, M.D., HIGHLAND OBSTETRICAL GROUP, and ALEXANDER WOMEN'S GROUP,

*Respondents.*

## BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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### INTEREST OF AMICUS CURIAE

New York submits this brief as *amicus curiae* in support of affirmance of the judgment of the United States Court of Appeals for the Second Circuit *in banc* in this matter. That judgment vacated a portion of the panel opinion holding unconstitutional, under the First Amendment, two provisions of a preliminary injunction issued by the District Court for the Western District of New York. These provisions, along with the other injunctive provisions which are not in dispute, were crafted by the district court to balance the competing interests

arising out of anti-abortion protests occurring in Western New York.

The State of New York has a paramount concern in assuring that the governmental interests at stake in this litigation are properly served. The State has a strong commitment to the protection of protest activities such as those engaged in by petitioners, which indisputably constitute a form of political speech protected by the First Amendment. "Defendants are entitled to express their views on abortion, 'particularly when standing on a public sidewalk where, since time immemorial, the authority to regulate speech is sharply restricted.' " *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1432 (W.D.N.Y. 1992) (citations omitted). However, the State has an equally strong interest in protecting its citizens' safety and well-being in the context of public debate. Through the exercise of its police powers, the State must ensure that the right to freedom of expression is not manifested through incidents of violence.

## THE INJUNCTIVE PROVISIONS AT ISSUE

The United States District Court for the Western District of New York, Richard J. Arcara, *Judge*, entered the preliminary injunction at issue in this litigation on February 14, 1992. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1417.[1] The injunction issued following an evidentiary hearing on

[1] Petitioners are the Reverend Paul Schenck and Dwight Saunders, two of the defendants in the original action. The other defendants include the organizations Project Rescue Western New York, Operation Rescue and Project Life of Rochester, and forty-eight individuals (collectively "Project Rescue").

The respondents, plaintiffs in the original action, are the health care providers Buffalo Gyn Womenservices, P.C., Erie Medical Center, Paul J. Davis, M.D., Shalom Press, M.D., Barnett Slepian, M.D., Morris Wortman, M.D., Highland Obstetrical Group, and Alexander Women's Group, and a not-for-profit corporation, Pro-Choice Network of Western New York (collectively "Pro-Choice").



Pro-Choice's motion to convert a previously issued temporary restraining order (TRO) into an injunction.[2] The district court also considered evidence adduced at contempt hearings of five individuals (including petitioner Schenck) and Project Rescue of Western New York, each charged with violating the TRO. *See Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1421.

One of the two provisions of the injunction challenged by petitioners creates a fifteen-foot buffer zone around the facilities in the Western District of New York subject to protests, prohibiting demonstrations within fifteen feet of facility entrances and driveways, or within fifteen feet of any person or vehicle seeking access to or leaving such facility, but allowing two demonstrators to enter the buffer zone to engage in non-threatening conversation ("sidewalk counseling") with any person or group of persons.[3] The second challenged provision requires "sidewalk counselors" to "cease and desist" from their counseling and to leave the buffer zone if any one or group of persons sought to be "counseled" does not want "counseling" or wants to leave or walk away.[4]

[2] The TRO was issued to enjoin a blockade of a clinic in Western New York announced for September 28, 1990. Project Rescue held a peaceful demonstration on that date instead. *See Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1422.

[3] Paragraph 1(b) enjoins Project Rescue from:

> demonstrating within fifteen feet . . . of doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities [at which abortions are performed in the Western District of New York], or within fifteen feet of any person or vehicle seeking access to or leaving such facilities, except that the form of demonstrating known as sidewalk counseling by no more than two persons as specified in paragraph (c) shall be allowed.

*Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1440.

[4] Paragraph 1(c) enjoins Project Rescue from:

> physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving . . . any facility at

The United States Court of Appeals for the Second Circuit, upon rehearing *in banc*, affirmed the two provisions except to the extent modified, and vacated the portion of the panel opinion invalidating the provisions. *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995).[5] In the majority opinion,[6] the court applied *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516 (1994), and concluded that the injunction as a whole was content-neutral, and that both the fifteen-foot buffer zone provision and the "cease and desist" provision were constitutional because they burden no more speech than necessary to serve significant governmental interests. *Id.* at 381-93. The court directed that the language of the injunction be modified to conform to the

> which abortions are performed; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is subject to be counseled wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (b) pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility . . . .

*Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1440.

[5] The original panel opinion is published as *Pro-Choice Network v. Schenck*, 67 F.3d 359 (2d Cir. 1994).

[6] The majority opinion was written by Judge Oakes, in which Chief Judge Newman and Judges Kearse, Miner, Walker, Leval, Calabresi, Cabranes, and Parker concurred. *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d at 381-93; Judge Winter concurred in the result in a separate opinion in which Chief Judge Newman and Judges Kearse, Mahoney, McLaughlin, Jacobs, Walker, Leval, Calabresi, and Cabranes concurred. *Id.* at 394-98. Judge Jacobs concurred in the result in a separate opinion in which Judge Mahoney concurred. *Id.* at 398-99. Judge Meskill dissented in a separate opinion in which Judge Altimari concurred. *Id.* at 399-409. Judge Altimari dissented in a separate opinion. *Id.* at 409-11.



district court's decision that the "cease and desist" provision only be enforced if the person or group of persons to be counseled "indicates, either verbally or non-verbally, that they do not wish to be counseled. . . ." *Id.* at 391 (quoting *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1434).

## SUMMARY OF ARGUMENT

As this Court has recognized, in regulating protest activities in public fora, the State "has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 2526 (1994) ("*Madsen*"). The courts may regulate protest activities through content-neutral injunctions designed to protect the rights of all parties involved, and such injunctions will be upheld if they "burden no more speech than necessary to serve significant government interests." *Id.* at 2525.

New York asserts that the requisite "fit" between the objectives of the injunctive provisions at issue and the restrictions they impose on freedom of speech is achieved in this case when measured from the perspective of the State's concern for the safety and welfare of its citizens—protesters and patients alike. In reaching the conclusion that the State's interest in preserving law and order and promoting the free flow of traffic justifies the challenged injunctive provisions, some deference should be given to the findings of the court issuing the injunction, based upon its familiarity with the facts and the background of the dispute between the parties. *See Madsen*, 114 S. Ct. at 2527. Deference to the issuing court's assessment of the illegalities it has identified and to the remedies needed to redress them allows, indeed encourages, swift and effective responses to exigent situations.

Here, the district court designed an injunction, after extensive evidentiary hearings, which was tailored to the facts

before it but which "would apply equally to protests that support abortion, or indeed, to protests supporting or opposing any other cause." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1433. The carefully crafted injunctive provisions should be allowed to stand, and the judgment of the Second Circuit sitting *in banc* affirmed.

## ARGUMENT

### I

### THE FIFTEEN-FOOT FLOATING BUFFER ZONE BURDENS NO MORE SPEECH THAN NECESSARY TO PROTECT THE GOVERNMENTAL INTERESTS AT STAKE

In *Madsen*, this Court upheld the provision of an injunction prohibiting anti-abortion demonstrators from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right-of-way or private property within thirty-six feet of the property line of a clinic that performs abortions, as a means of ensuring access to the clinic. *Madsen*, 114 S.Ct. at 2526-28. The Court viewed this total ban on protest activity within the court-mandated thirty-six-foot "buffer zone" as necessary to accomplish the objectives identified by the issuing court of preventing protesters from impeding access to the clinic by congregating on the paved portion of the street, marching in front of the clinic's driveways, and milling around vehicles approaching the clinic so that "sidewalk counselors" would have the opportunity to distribute anti-abortion literature to the vehicles' occupants. *Id.* at 2526-27. As the Court noted:

> "The type of focused picketing prohibited by [the state court injunction] is fundamentally different from more generally directed means of communication that may not be completely banned in [public places]". Here the picketing is directed primarily at patients and staff of the clinic.



*Madsen*, 114 S.Ct. at 2527 (quoting *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (bracketed words in original; parenthesis omitted)).

In the present case, the more conservative fifteen-foot buffer zone was imposed for nearly identical reasons. The district court found that Project Rescue "constructively blockades" clinics, *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424, and that demonstrators "crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff." *Ibid.* The district court also found that the protesters "routinely congregate in or near the driveway entrances to the facility parking lots," thereby "creat[ing] a danger to both the occupants of the cars and the demonstrators themselves." *Ibid.*[7]

That the buffer zone provision in this case provides for a "floating" fifteen-foot radius from clinic entrances and persons or vehicles entering or leaving such facilities, as opposed to the stationary zone in *Madsen*, does not render the fifteen-foot buffer zone unconstitutional. The buffer zone floats around individuals to protect public safety and preserve law

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[7] The First Amendment does not require a demonstration of intransigence with respect to a narrower order before an injunction tailored to prevent harmful conduct may be implemented. As Judge Oakes correctly observed for the *in banc* majority:

> nothing in *Madsen* states, or even implies, that a TRO must fail before a broader injunction may be imposed; the *Madsen* Court simply noted that the failure of an initial injunction to accomplish its purpose is one factor which "may be taken into consideration" in evaluating the constitutionality of a subsequent, broader order.

*Pro-Choice Network of Western New York v. Schenck*, 67 F.3d at 389 (quoting *Madsen*, 114 S.Ct. at 2527). The purpose of the TRO in this case was simply to maintain the status quo until a full review of the facts and legal arguments could occur. *Id.* at 388-89.

and order by ensuring that a reasonable distance is maintained between the protesters and those entering and leaving the clinics. The district court fashioned this relief after finding, *inter alia*, that patients, patient escorts and clinic personnel are forced to run a "gauntlet of harassment and intimidation," *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424, a type of focused demonstration which often degenerates into pushing and shoving with a high probability of escalating physical confrontation that causes immediate threat to public safety and order.

Similarly, the fifteen-foot buffer zone floats around vehicles entering and leaving the clinics to protect both the occupants and the protesters from physical injury. The district court found this to be a particularly significant hazard based on its finding that drivers are often "intimidated or confused" by the demonstrators. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1424.

In assessing the necessity for the fifteen-foot buffer zone provision, the district court's findings and conclusions are entitled to some deference even under the heightened review of content-neutral injunctions. *Madsen*, 114 S.Ct. at 2527. With respect to the need for the floating buffer zone to protect law and order and the free flow of traffic, of particular significance are the district court's findings that the nature of the protest activities involved impairs the ability of "[l]ocal law enforcement . . . to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1426. The district court stated:

> Defendants participate in their 'rescue' activities on a continual basis and the local police do not have the resources necessary to monitor the situation constantly. Often times, when they respond to a complaint, the demonstrators simply disperse, only to return later when the police depart. Even when police arrest a 'pro-life' demonstrator for harassing a patient, successful prosecution is often difficult because the patient is reluctant to testify or cooperate out of fear that her identity might be made public. Furthermore, the record shows that arrest and conviction pursuant to local laws has not deterred defendants from repeatedly engaging in their illegal pattern of activity.



*Ibid.* The fifteen-foot floating buffer zone provision was crafted in part because of the absence of any effective means to monitor the protest activities, which have then turned violent and led to physical injuries.[8] The provision operates in this vacuum by maintaining separation between the individuals at the site of the protest, thereby defusing the situation before it escalates into a dangerous confrontation. At the same time, the floating buffer zone protects the State's strong interest, identified in *Madsen*, 114 S.Ct. at 2526, in promoting the free flow of traffic on public thoroughfares and the unimpeded exercise of its citizens' right to travel. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1434.

The fifteen-foot buffer zone provision devised by the district court burdens no more speech than necessary to protect the governmental interests at stake. In recognition of the fact that the buffer zone operates around clinic entrances as well as around people seeking access to and leaving the facilities, the district court made an exception for "sidewalk counselors," permitting two "counselors" to engage in non-threat-

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[8] This Court can take judicial notice of incidents of violence and vandalism in and around clinics that provide abortion services in other States. There has also been extensive litigation relating to clinic incidents in the Second Circuit alone. *See, e.g., People of the State of New York v. Operation Rescue National*, 80 F. 3d 64 (1996); *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir.), *cert. denied sub nom. Syversen v. Summit Women's Center West, Inc.*, __ U.S. __, 114 S. Ct. 185 (1993); *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989 (2d Cir. 1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Upper Hudson Planned Parenthood, Inc. v. Doe*, 836 F. Supp. 939 (N.D.N.Y. 1993), *aff'd mem.*, 29 F.3d 620 (2d Cir. 1994).

ening conversation "with each person or group of persons they are seeking to counsel." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1440; *see also id.* at 1434. Thus, unlike the thirty-six-foot buffer zone in *Madsen* which was off limits to all protesters, the fifteen-foot buffer zone provision in this case is not absolute.

In addition, the relatively small distance of fifteen feet ensures that the protesters are a constant presence, leaving them with ample means to communicate their message:

> Defendants may still assemble near plaintiffs' clinics so long as they remain outside the fifteen foot "clear zones." They can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by. If confined to the area fifteen feet away from the entrances of the clinics' driveways and parking lots, defendants and their picket signs will still be visible to people approaching the clinic and their message will still be conveyed.

*Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1437. In *Madsen*, this Court took into account the fact that "[p]rotesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots." 114 S. Ct. at 2527.

The fifteen-foot buffer zone provision in this case should be upheld because it protects the governmental interests in safety and public order which are at stake, while not imposing any significant reduction in the protesters' ability to convey their message, to be both seen and heard. Moreover, the provision is fully justified on the evidentiary record before the district court, which crafted the provision only after conducting extensive proceedings to gain "familiarity with the facts and the background of the dispute between the parties." *Madsen*, 114 S. Ct. at 2527. Accordingly, the provision should not be disturbed on appellate review.



## II

## THE "CEASE AND DESIST" PROVISION REGULATES "CAPTIVE AUDIENCE" SOLICITATIONS WITHOUT CONSIGNING THE PROTESTERS TO A DISTANCE THAT EFFECTIVELY SILENCES THEM

The "cease and desist" provision focuses on the "sidewalk counselors," described by the district court as "comprised of a small group of dedicated 'pro-life' activists who station themselves in front of plaintiffs' medical facilities on a regular basis." *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1425. The district court noted that "[m]any of the 'sidewalk counselors' . . . have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." *Ibid.* The court also described a comparable zeal on the part of the patient escorts which "often serves only to exacerbate an already difficult situation," *id.* at 1425, n. 6, noting that "[t]he patient escorts often respond by raising their voices in order to drown out the 'counselors' ' message, and attempt to block and impede the 'sidewalk counselors' from following the patients." *Ibid.*

It is in this context that the "cease and desist" provision serves to protect the health and safety of all involved. The "sidewalk counselors" must "cease and desist" from their "counseling" only at the point that the targeted person or group of persons express their wish not be "counseled." The district court found that it is precisely at this juncture that the non-threatening efforts of the "sidewalk counselors" to persuade their targets erupt into heated encounters. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. at 1425.

The pinpointing by the lower court of the precise sequence of events which threatens public safety and order satisfies the "narrow tailoring" required in the context of constitutionally protected activity. *See, e.g., NAACP v. Claiborne*

*Hardware*, 458 U.S. 886, 916 (1982) ("precision of regulation" is required). It also reflects this Court's recognition that ostensibly peaceful speech-related acts that are intertwined or "entangled with violence" are the proper subject of state regulation. *Milk Wagon Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 294-95 (1941) ("Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct").

At the same time, the "cease and desist" provision, unlike the 300-foot "no approach" provision struck down in *Madsen*, 114 S. Ct. at 2530, does not burden more speech than necessary to accomplish its goal. In *Madsen*, this Court held unconstitutional a State's attempt to prevent clinic patients from being "stalked" or "shadowed" by ordering "petitioners to refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate' in an area within 300 feet of the clinic." *Madsen*, 114 S. Ct. at 2529. The Court concluded that when a prohibition sweeps that broadly, enjoining "*all* uninvited approaches" without evidence that the speech is "independently proscribable," it runs afoul of the principle "that in public debate, our citizens must tolerate insulting, and even outrageous, speech in order to provide the adequate breathing space to the freedoms protected by the First Amendment." *Ibid.* (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

The "cease and desist" provision, by contrast, does not prohibit the "sidewalk counselors" from approaching persons seeking entry to the facilities, nor does it consign them to a distance that is tantamount to silencing them. Even if the target expresses an immediate wish not to be "counseled," the injunction merely requires the "counselors" to retreat fifteen feet, where they can be seen and heard without being confrontational and dangerously provocative. As Judge Oakes aptly concluded for the *in banc* majority: "[I]t is the demonstrators' physical proximity which is regulated rather than



their message." *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d at 392.

The "cease and desist" provision is consistent with this Court's recognition that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684 (1992). As constructed, the "cease and desist" provision allows for the expression of the protesters' message while at the same time recognizing that women seeking to utilize facilities that provide abortion services can be a "captive audience." In *Madsen*, this Court analogized the State's strong interest in protecting privacy in the home recognized in *Frisby v. Schultz*, 487 U.S. 474, with its interest in protecting medical privacy. *Madsen*, 114 S.Ct. at 2526. The Court acknowledged "that while targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstances." *Ibid. See also International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (solicitation in public airports); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (political advertising on public transit system); *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990) (subway panhandling).

The "cease and desist" provision, like the buffer zone, thus furthers the State's strong interest in protecting the safety and well-being of its citizens while burdening no more speech than necessary. For this reason, the "cease and desist" provision of the injunction also passes constitutional muster under *Madsen*, and should be sustained on appeal.

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Second Circuit *in banc*, vacating the portion of the panel opinion striking down the fifteen-foot buffer zone provision and the "cease and desist" provision as unconstitutional under the First Amendment and affirming these provisions as modified.

Dated: New York, New York
July 1, 1996

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

No. 95-1065

IN THE

# Supreme Court of the United States

October Term, 1995

REV. PAUL SCHENCK and
DWIGHT SAUNDERS,

*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF FEMINIST MAJORITY FOUNDATION, et al., AMICI CURIAE IN SUPPORT OF RESPONDENTS

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59 pp

NATIONAL WOMEN'S LAW CENTER

NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE

WOMEN'S LEGAL DEFENSE FUND

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## INTERESTS OF AMICUS CURIAE

The Feminist Majority Foundation ("Foundation") is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights, and safe access to abortion and birth control. The Foundation actively pursues legal protection for reproductive health services, and provided legal counsel for Respondent Women's Health Center in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994).

The Foundation runs the largest clinic defense project in the nation, and has been active in defending the clinics in western New York that are the subject of this appeal. Since 1989, the Foundation's National Clinic Access Project has mobilized and trained more than 40,000 volunteers in more than 40 cities in 22 states to assist clinics targeted by anti-abortion groups. As part of this Project, the Foundation coordinated the response to major blockades that were part of the pattern of illegal obstructions addressed by the injunction at issue in this case. In this capacity, staff, volunteers, and supporters of the Foundation witnessed first-hand the violence directed against clinics in Buffalo, the clinic workers, and the women who seek the clinics' services.

## SUMMARY OF ARGUMENT

Most of the legal issues posed by Petitioners in this appeal have been explicitly resolved by this Court in its *Madsen* decision. In particular, *Madsen* resolved any lingering doubt that the First Amendment and the prior

restraint doctrine permit the sort of injunction issued in this case. *Madsen* held unequivocally that an injunction is not a content-based regulation of speech merely because the injunction is directed against a particular group whose members persistently obstruct access to abortion clinics, or repeatedly harass clinic patients and staff.

Thus, under the appropriate *Madsen* standard, the only questions in this case are (1) whether the injunction is supported by one or more significant interests, and (2) whether the injunction burdens more speech than is necessary to serve that interest. Both of these questions must be answered in favor of the injunction.

The interests supporting the injunction in this case are identical to the interests recognized as significant by this Court in its *Madsen* opinion. In this case, as in *Madsen*, the injunction serves to protect women's access to lawful and necessary medical care, promotes public safety and order, ensures the unobstructed ingress to and egress from clinics, protects private property rights, and protects the medical privacy of patients at the clinics. The facts regarding the obstruction and harassment of clinics, clinic staff, and patients in western New York are indistinguishable in kind or degree from the facts that this Court recognized in support of the injunction in *Madsen*. Additionally, Amicus Feminist Majority Foundation has assembled a large body of empirical evidence from a comprehensive survey of clinics around the country indicating the importance of injunctions such as the one in this case in preventing the persistent violence directed at clinics by anti-abortion activists.

The injunction provisions challenged by Petitioners also easily satisfy the *Madsen* requirement that they burden no more speech than necessary to accomplish these interests. The 15-foot buffer zone this injunction creates around clinic entrances and driveways is necessary to preserve access to the clinics, and is actually more protective of speech than the injunction upheld by this Court in *Madsen*, which created a 36-foot buffer zone that forced protesters to move across the street from the clinic. Likewise, the provision of the present injunction that creates a 15-foot buffer zone around individuals approaching or leaving a clinic, and which requires protesters to cease and desist "counseling" persons who express a desire to be left alone, is necessary to prevent the systematic harassment and coercion of patients that the District Court found to exist before the injunction was issued, and also to protect medical safety and privacy.



## ARGUMENT

### I. *MADSEN V. WOMEN'S HEALTH CENTER* PROVIDES THE PROPER STANDARD IN THIS CASE

In *Madsen v. Women's Health Center*, this Court articulated the First Amendment standard applicable to content-neutral injunctions that affect speech and expressive actions. In such cases, the Court held that the traditional time, place, and manner test must be replaced by a "somewhat more stringent application of general First Amendment principles." *Madsen*, 114 S.Ct. at 2524. Under the revised *Madsen* standard, "We must ask . . . whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest." *Madsen*, 114 S.Ct. at 2525.

Petitioners argue that the injunction in this case should be judged under a strict prior restraint standard

rather than what they characterize as the "exceptional" *Madsen* standard. *See* Pet. Br. at 23.[1] Indeed, Petitioners contend that the application of the *Madsen* standard is essentially limited to the "highly unusual factual circumstances at the abortion facility in Melbourne, Florida." Pet. Br. at 26.

This argument directly contradicts explicit statements in the *Madsen* opinion itself. In *Madsen*, the Court specifically considered and rejected a prior restraint analysis for reasons that are directly applicable to the injunction in this case. *See Madsen*, 114 S.Ct. at 2524 n.2. In *Madsen*, as in this case, the protesters potentially affected by the trial court's order could express their opinions in many different ways, so long as they did not do so within the narrow buffer zone defined by the injunction. *Id.* Likewise, in *Madsen*, as here, the injunction was not issued because of the content of Petitioners speech, but rather because of the Petitioners' obstructive conduct. *Id.* Thus, as the Court concluded in *Madsen*, "[n]ot all injunctions which may incidentally affect expression . . . are 'prior restraints'." *Id.* As discussed in the next section of this brief, there are no significant differences between the type or magnitude of conduct in this case and the conduct in *Madsen*.

Therefore, *Madsen* provides the proper standard for assessing whether the injunction in this case passes muster under the First Amendment. Accordingly, the first question in this case is whether the injunction issued by the District Court served a significant governmental interest, and the second question is whether the injunction

1. Petitioners' Brief will be referred to as "Pet. Br." throughout this brief.



burdened no more speech than necessary to serve that interest.

## II. THE RESPONDENTS' INTERESTS IN AVOIDING VIOLENCE, HARASSMENT, AND OBSTRUCTION OF THEIR FACILITIES ARE IDENTICAL TO THE INTERESTS SUPPORTING THE INJUNCTION UPHELD BY THIS COURT IN *MADSEN*

In their response to the Second Circuit's opinion in this case, the Petitioners inaccurately minimize the facts relating to attacks on clinics in western New York that led to the imposition of the injunction by the District Court. Petitioners also misstate the scope and application of the *Madsen* holding. Petitioners argue that the Second Circuit's *in banc* opinion in this case neglected "two crucial factors in the *Madsen* analysis: first, the need for initial resort to a narrower, nonspeech-restrictive injunction before imposing broader restrictions; and second, the need for a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure." Pet. Br. at 27. Even if this narrow phrasing accurately reflects the *Madsen* holding, the facts in this case easily satisfy the standard.

In this case, the District Court's preliminary injunction was preceded by two years of blockades and other attacks on clinics in the Buffalo area. Also, before entering the preliminary injunction challenged in this case, the District Court *did* resort initially to a narrower order in the form of a Temporary Restraining Order. Unlike the preliminary injunction, the TRO did not contain provisions imposing 15-foot buffer zones around clinic entrances, driveways, parking lots, or vehicles coming to

or leaving from clinics. *Compare Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 382 n.1 (2d Cir. 1995)(quoting relevant portion of TRO) *with id.* at 393 (quoting relevant portion of preliminary injunction). Multiple violations of the District Court's TRO would certainly constitute "a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure." *See Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1423 (1992)(detailing contempt motions brought against various protesters for violating District Court's TRO). Thus, the facts in this case satisfy even the Petitioners' narrow articulation of the *Madsen* standard.

Putting aside the strong evidence in this case, Petitioners' characterization of the *Madsen* factors is flawed. With regard to the first factor cited by Petitioners, nothing in the *Madsen* decision requires a trial court confronting ongoing obstructions of medical facilities to issue an ineffective injunction before it can issue an effective one. The fact that a prior injunction in *Madsen* failed to solve the problems posed by obstructive protests outside the Melbourne clinic was relevant to the First Amendment analysis only because the facts surrounding the violations of the prior injunction contributed to the trial court's determination that "allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option." *Madsen*, 114 S.Ct. at 2527. Certainly, as this Court noted in *Madsen*, the failure of a previous injunction "may be taken into consideration in evaluating the constitutionality of the broader order," *id.*, but such an order (if it exists) is simply part of



the entire factual context that any trial court facing similar circumstances must face. Facts other than the violation of a previous injunction can also contribute to a trial court's conclusions about the viability of effective injunction provisions, as they obviously did in the present case.

This Court's discussion of the factual predicates to the *Madsen* injunction indicates that even if there had been no prior injunction in *Madsen*, the facts of that case would justify injunction provisions such as the buffer zone surrounding the clinic. The conduct identified by the trial court in *Madsen*, such as the blocking of ingress to and egress from buildings and the harassment of patients going to and from clinics, would in themselves satisfy the significant state interest requirement of the *Madsen* standard. Cases of this sort are always highly fact-specific, and as the Court pointed out in *Madsen*, "some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, 114 S.Ct. at 2527.

The second "crucial factor" cited by Petitioners as part of the *Madsen* standard also pertains to the issue of whether the injunction is supported by a significant governmental interest. In this respect, Petitioners' assertion of "the need for a showing of pervasive lawbreaking," Pet. Br. at 27, fails to acknowledge the breadth of interests that a trial court may consider in cases such as these. While outright "lawbreaking" may be one legitimate target of a content-neutral injunction, an injunction may also regulate otherwise lawful activity if that activity occurs in an inappropriate setting, at inappropriate times, or in a manner that makes other lawful conduct impossible. The notion that lawful activities may be regulated in this

way is not a novel concept. Similar considerations have long been a part of First Amendment time, place, and manner jurisprudence. In those cases, as here, "[t]he crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

A recognition of the judicial responsibility to balance competing interests is at the core of the *Madsen* decision. In *Madsen*, this Court held that five significant interests were served by the provisions of the injunction upheld in that case. Drawing on the factual findings of the lower courts, this Court noted that the *Madsen* injunction protected "a woman's freedom to seek lawful medical or counseling services in conjunction with her pregnancy," *Madsen*, 114 S.Ct. at 2526, ensured "the public safety and order," *id.*, promoted "the free flow of traffic on public streets and sidewalks," *id.*, protected private property rights, *id.*, and protected "medical privacy," *id.*, an interest akin to the residential privacy interest acknowledged in previous cases such as *Frisby v. Schultz*, 487 U.S. 474 (1988). According to this Court, "the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." *Madsen*, 114 S.Ct. at 2526.

Petitioners attempt to distinguish this case from *Madsen* by arguing that the *Madsen* holding depended on "rather extraordinary factual circumstances." However, the background to the protests in Buffalo indicates that the circumstances of this case presented to the District Court precisely the same "extraordinary factual circumstances" found in *Madsen*. As in *Madsen*, the trial judge in this case concluded that this injunction provided the narrowest



effective response to an ongoing pattern of aggressive and intentionally obstructive behavior directed at the clinics in Buffalo.

A review of the District Court's opinion in this case reveals findings very similar in nature to those supporting the *Madsen* injunction. With regard to the interest in protecting access to clinics, the District Court found that Respondent clinics have "on numerous occasions" been victims of blockades, during which "demonstrators trespass on the clinic property and sit or lay in the entrances of the clinic in an attempt to block access to and egress from the clinic." *Pro-Choice Network*, 799 F.Supp. at 1424. These tactics often achieved their objective, as the District Court found that "[o]n many of those occasions, the operation of the targeted facility was effectively stopped or significantly hampered." *Id.* The District Court found that demonstrators also constructively blockaded the clinics by "frequently and routinely congregat[ing] in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities." *Id.* According to the evidence introduced in the District Court, this behavior had caused "stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupt[ed] the atmosphere necessary for rendering safe and efficacious health care." *Id.*

With regard to the interest in preserving public safety and order, the District Court found that "[m]any of the 'sidewalk counselors' and other defendants have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." *Id.* at 1425. With regard to the traffic control interest, the District Court found that the

demonstrators' activities "intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger both to the occupants of the cars and the demonstrators themselves." *Id.* at 1424. Finally, with regard to the interest in preserving medical privacy, the District Court found that "sidewalk counselors" frequently used video cameras "as offensive weapons to harass and intimidate patients," who "are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion." *Id.* at 1426.[2] Unfortunately, the ugly scenario that generated the *Madsen* case is not at all "extraordinary"; it was quite accurately replicated in Buffalo.

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2. Petitioners' incorrectly assert that "[a] clear majority of the *in banc* Second Circuit forthrightly agreed that this case does not present the record of lawlessness that this Court faced in *Madsen*." Pet. Br. at 45. Petitioners cite Judge Winter's concurring opinion and Judge Meskill's dissenting opinion as support for this statement. *Id.* However, Petitioners fail to cite the clear statement in the Second Circuit's majority opinion--which was joined by nine of the fifteen judges hearing the *in banc* appeal--that "We are not convinced by the dissent's recitation of distinctions between the record in the instant case and in *Madsen*." *Pro-Choice Network of Western New York*, 67 F.3d at 388. Petitioners also fail to note the Second Circuit majority's finding that the injunction was supported by an "extensive record documenting Project Rescue's harassment and intimidation of patients, and documenting the effects produced by such harassment." *Id.* at 389. The District Court's findings cited in the text accompanying this footnote indicates that the District Court was faced with precisely the same types of conduct that the state trial court faced in *Madsen*.



## III. THE "SPRING OF LIFE" DEMONSTRATIONS OF 1992 REINFORCE THE DISTRICT COURT'S FINDINGS CONCERNING THE THREATS TO CLINICS IN BUFFALO

The facts cited by the District Court to justify issuing the injunction were not isolated incidents. Rather, these incidents were part of a longstanding pattern of attacks on clinics in Buffalo and western New York. For example, as the District Court found, there was extensive evidence that clinics were subject to blockades on numerous occasions prior to the issuance of the injunction. *Pro-Choice Network*, 799 F.Supp. at 1424. Also, clinic patients and staff were routinely harassed and intimidated. *Id.* at 1424-25. Another manifestation of this pattern of attacks was the so-called "Spring of Life" protests, which commenced in April, 1992. Although the Court of Appeals did not consider the facts surrounding the "Spring of Life" demonstrations, *see Pro-Choice Network*, 67 F.3d at 386 n.3, Amicus Feminist Majority Foundation believes that these demonstrations further illustrate the atmosphere of violence and intimidation that led the District Court to grant the preliminary injunction. The "Spring of Life" demonstrations were part of the larger, systematic attack on the provision of reproductive health care in Buffalo, which provided the impetus for the injunction challenged in this case. Thus, the incidents in the "Spring of Life" demonstrations are relevant to the Court's consideration of these issues.

The "Spring of Life" campaign was an outgrowth of a concentrated series of blockades directed at clinics in Wichita, Kansas during the summer of 1991. The Wichita campaign lasted 46 days and led to 2,600 arrests.

*See* Catherine S. Manegold, *Protesters Set for Collision on Abortion*, N.Y. Times, April 20, 1992, at B1. The organizers of the Wichita protests next targeted Buffalo and the surrounding western New York area, calling for a two-week series of protests to begin on April 20, 1992. *Id.* Amicus Feminist Majority Foundation's National Clinic Access Project coordinated the response to these planned protests in the Buffalo area, to prevent a repeat of the Wichita experience. Starting eight weeks before the "Spring of Life" action began, six organizers from the Foundation began working with clinic directors, law enforcement, and pro-choice groups to recruit and train volunteers to counteract threatened blockades. The organizers also worked with local attorneys on legal strategies to counteract the protests. The injunction at issue in this case was the single most significant component of the legal response to the protests.

Blockades held in conjunction with the "Spring of Life" demonstrations attracted hundreds of anti-abortion protesters. *See id.* These blockades occasionally turned violent, and police arrested 597 demonstrators during the period from April 20-May 2, 1992. Michael Beebe, *Arrests Profiled*, The Buffalo News, May 27, 1992, at B1. On several occasions, organizers of the "Spring of Life" blocked access to clinics by having large numbers of protesters sit down in public streets. Police were forced to arrest almost 200 protesters for engaging in this tactic outside Respondent Dr. Shalom Press's clinic. According to one press account of this incident, "As police moved protesters to a nearby school bus, other pro-life supporters took their place in the road. By noon, police had filled six buses and were taking protesters to a temporary police station." Tom Ernst & Phil Fairbanks, *Police Arrest Pro-*



*Lifers at Amherst Site*, The Buffalo News, April 22, 1992, at A1. Respondent Buffalo GYN Womenservices encountered similar tactics when a large group of protesters sat down in the clinic driveway to block vehicular access to the clinic. This incident led to 71 arrests. Gene Warner, Juan Forero & Phil Fairbanks, *71 Pro-Lifers Arrested at City Clinic*, The Buffalo News, April 24, 1992, at A1. At yet a third location, protesters blocked traffic in front of a doctor's office before retreating in the face of police warnings. Gene Warner, Jane Kwiatkowski & Michael Beebe, *Abortion Protesters Block Linwood*, The Buffalo News, April 27, 1992, at C1.

In addition to blocking roads and clinic entrances, "Spring of Life" protesters actually stormed the premises at Buffalo GYN Womenservices in an apparent effort to shut down the provision of medical services altogether. Jane Kwiatkowski & Michael Levy, *71 Arrested In Purported End to Protests: Attempt to Rush Clinic Results in Most Seizures*, The Buffalo News, May 3, 1992, at B1. In this incident, as in many others, the protesters' actions were highly organized and well-coordinated--so much so that the protesters often would outflank the police. When the protesters stormed the Womenservices clinic, for example, the initial police presence was insufficient to protect the clinic, and additional forces had to be ordered in as reinforcements. *Id.* A similar attack took place outside a 13-story medical complex, which contained a clinic on its fifth floor, among many other types of medical offices. Dan Herbeck, Jane Kwiatkowski & Michael Beebe, *5 Leaders of Protest Face Arrest*, The Buffalo News, April 28, 1992, at A1. At this blockade, protesters physically attacked clinic supporters, climbed over snow-fences

erected to prevent trespassing, and crossed police lines in an attempt to shut down the clinic. *Id.* at A4.

These incidents, like the blockades that occurred prior to the issuance of the preliminary injunction, demonstrate that the behavior of anti-abortion protesters in Buffalo was far removed from the "silent witness[ing], . . . polite offers of information, . . . urgent entreaties, . . . pointed criticisms, [and] emotional exclamations" described by Petitioners. Pet. Br. at 24. The behavior here was also far worse than "some picketers and counselors . . . occasionally fail[ing] to say just the right thing in just the right way." Pet. Br. at 21. If the evidence before the District Court had reflected nothing more than the forceful but benign expression of opinion, then the injunction would be subject to challenge on First Amendment grounds. In this case, however, the District Court had abundant evidence that protesters had crossed the line from legitimate speech and were engaged in large-scale intimidation, harassment, and obstruction of clinic personnel and clinic patients. The injunction in this case thus was an indispensable and constitutional response to attacks on Buffalo-area clinics, in light of the longstanding rule that "[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). *See also Cameron v. Johnson*, 390 U.S. 611, 615-17 (1968)(rejecting First Amendment challenge to law prohibiting obstruction of courthouse).



## IV. EMPIRICAL RESEARCH CONCERNING CLINIC VIOLENCE NATIONWIDE SUPPORTS THE DISTRICT COURT'S ISSUANCE OF THE INJUNCTION IN THIS CASE

For the last three years, Amicus Feminist Majority Foundation has conducted a comprehensive survey of violence directed at clinics nationwide.[3] The results of these surveys provide substantial empirical support to the conclusions of the District Court in this case. The information discussed in this section is not intended to suggest that courts may issue injunctions based on generalized national findings. Rather, the survey results provide support for the efficacy and necessity of the District Court's response to a problem that has also been encountered in other jurisdictions. The survey results also indicate that trial courts remain reluctant to issue injunctions protecting clinics in the absence of substantial evidence of the sort that was introduced in the District Court in this case.

Four specific conclusions can be drawn from these surveys that are relevant to this case: First, the surveys

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3. The survey results discussed in this section of the Foundation Amicus brief are drawn from this 1995 Report. Feminist Majority Foundation, 1995 Clinic Violence Survey Report. The 1995 survey was mailed to 902 clinics in the United States and American Samoa in September, 1995, and follow-up calls were made in September and October, 1995. Surveys were completed by 310 clinics. "Data were analyzed using SPSS-X (Statistical Package for the Social Sciences) uni-variate and bi-variate statistical techniques." *Id.* at 1.

indicate that violence and threats of violence continue to plague reproductive health clinics throughout the country. Second, the violence and threats reported by clinics significantly impacts the effectiveness of clinic operations, especially by making it difficult for clinics to hire and retain staff. Third, violence against clinics can be substantially reduced through effective law enforcement action, including the enforcement of protective injunctions. Fourth, injunctions of the sort issued in this case are not routinely granted. Although many clinics have obtained protective injunctions, most clinics that sought such injunctions during the last year were denied relief.

The first conclusion drawn from the Foundation's survey indicates that violence against clinics is a persistent problem nationwide. In 1995, "38.6 percent of clinics experienced one or more of the most severe forms of clinic violence," including "death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson threats and arson attacks." *1995 Clinic Violence Survey Report*, at 3. More than 15 percent of the clinics experienced two or more different types of severe violence. *Id.* at 4. If vandalism, home picketing, and gunfire are also included, more than half of the clinics surveyed--a total of 55.8 percent--experienced some violence during 1995.

Even more disturbing is the breakdown of violent activities directed at clinic workers. Almost one in five clinics (17.1 percent) reported receiving death threats against its personnel, and more than one in ten (10.6 percent) reported that clinic staff had been stalked. The authors of the Survey conclude that the shift toward individualized threats to workers, rather than broad attacks on clinics, is in part attributable to the imposition of *Madsen*-



style injunctions and clinic buffer zones. *1995 Clinic Violence Survey Report*, at 6. This conclusion argues in favor of injunction provisions such as the buffer zone around individuals imposed by the District Court in this case, which will protect threatened clinic staff and patients, in addition to the protection of facilities offered by injunction provisions such as the fixed buffer zone upheld in *Madsen* (and, in a more restricted form, also used in this case). This type of injunction provision is no broader than the injunction upheld by this Court in *Madsen*; it simply responds to a somewhat different (but equally well-documented) problem than the lower court faced in that earlier case.

The second major conclusion drawn from the Foundation's 1995 Survey pertains to the specific administrative consequences of violence on the clinics surveyed. As a result of the targeting of individual workers by anti-abortion activists, clinics have long had a difficult time hiring and retaining staff, including key medical personnel such as doctors and nurses. "In 1995, 9% of clinics reported that staff members had quit as a result of anti-abortion violence and harassment." *1995 Clinic Violence Survey Report*, at 7. Not surprisingly, the clinics that were subject to the greatest incidence of violent attacks suffered the greatest staff attrition. "Of the clinics experiencing high levels of violence, 13.6% said staff members had resigned, compared with 9.3% of clinics reporting moderate violence and 7.3% of clinics reporting no violence." *Id.* The judicial interest in "protect[ing] a woman's freedom to seek lawful medical or counseling services in conjunction with her pregnancy," *Madsen*, 114 S.Ct. at 2526, necessarily encompasses the interest in protecting the personnel who perform these medical and

counseling services. Once again, although some provisions of the injunction in this case are specifically designed to protect clinic patients and personnel as opposed to clinic facilities, the underlying interests justifying the injunction here are the same as those endorsed by this Court in *Madsen*.

The third conclusion drawn from the Foundation's 1995 Survey is that effective law enforcement action correlates strongly with the diminution of violence against clinics. "Only 11%of clinics reporting excellent local law enforcement experienced high levels of violence, compared with 33.3% of clinics who reported poor law enforcement response." *1995 Clinic Violence Survey Report*, at 10. Similar patterns were evident with regard to state law enforcement response. Of particular note regarding the issues in the present appeal, death threats and stalking--two examples of violence that are likely to be controlled by the injunction provisions being challenged by Petitioners here--consistently correspond to effective law enforcement at every level. *Id.*

Despite the clear correlation between law enforcement effectiveness and the control of violence against clinics, two problems with law enforcement response to clinic violence are evident from the Survey. First, despite increased police efforts to work with clinics in response to violent activities of protesters, very few of the violent episodes reported by clinics led to arrests. "Only 13.8% of clinics reported arrests as a result of violence at clinics." *Id.* at 11. Second, primary protection of clinics continues to be left to local officials and federal and state judges, rather than federal law enforcement officials, despite the enactment in 1994 of the federal Freedom of Access to Clinics Act (FACE), 18 U.S.C. §248 (1996),



which makes anti-clinic violence a federal crime. The Survey found that among the clinics reporting FACE violations to the federal authorities, only 14.5 percent of the complaints were formally investigated, and the parties involved were officially interviewed only 12.9 percent of the time. *Id.* at 8. Only 8.1 percent of the complaints led to the filing of criminal proceedings. *Id.* Over half of the clinics filing FACE complaints (54.8 percent) were told that their claims should be handled locally. *Id.* This low level of criminal prosecutions by federal and local officials indicates the continued importance of precise and highly-focussed local remedies, such as injunctions and contempt actions. Existing remedies under broad state and federal criminal statutes simply have not provided adequate relief to stem the violence that many clinics in the United States continue to confront daily.

These problems are evident in this case. The District Court found that "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Pro-Choice Network*, 799 F.Supp. at 1426. The District Court also found that "[e]ven when police arrest a 'pro-life' demonstrator for harassing a patient, successful prosecution is often difficult because the patient is reluctant to testify or cooperate out of fear that her identity might be made public. Furthermore, the record shows that arrest and conviction pursuant to local laws has not deterred defendants from repeatedly engaging in their illegal pattern of activity." *Id.* Local law enforcement of ordinary criminal statutes has been woefully inadequate to protect the staff and patients of clinics in western New York. As the District Court concluded, many of these problems can be

overcome by the imposition of an injunction, enforceable through contempt actions, including civil contempt actions brought by the plaintiffs.

The final conclusion that can be drawn from the Foundation's Survey serves to assuage Petitioners' concern that unless this Court's *Madsen* decision is limited to its facts, "it would follow from *Madsen* that courts could issue speech-restrictive injunctions virtually upon demand." Pet. Br. at 28. The results of the Foundation Survey demonstrates that this is certainly not how *Madsen* has been interpreted and applied by the lower courts that have been approached by clinics requesting injunctions. Although more than half of the clinics reported violence, only 35.5 percent of the clinics surveyed by the Foundation are currently covered by an injunction or buffer zone. *1995 Clinic Violence Survey Report*, at 11. Injunctions are not routinely requested by all clinics, nor do the courts automatically issue the injunctions that are requested. In 1995, only 15.2 percent of clinics requested civil legal relief (3.2 percent of these cases involved requests for temporary injunctions, 5.8 percent were requests for permanent injunctions, and 4.2 percent were requests for restraining orders). *Id.* Most of these requests for legal relief were denied. "Only 46.8% of clinics who sought legal remedies actually obtained the desired protection." *Id.* Only in the small category of requests for permanent injunctions--issued after full fact-finding by the trial courts--were most of the clinics (72.2 percent, or 13 of 18 clinics) successful in obtaining relief. *Id.* Thus, the survey results indicate that trial courts continue to review injunction requests rigorously and skeptically; there is no evidence whatsoever to support Petitioners' implication that *Madsen* is being used by trial courts to issue rubber-



stamp injunctions against anti-abortion protesters "virtually upon demand."

## V. THE INJUNCTION IN THIS CASE DOES NOT BURDEN MORE SPEECH THAN IS NECESSARY TO PROTECT THE CLINICS

The final issue in this case is whether the injunction entered by the District Court below burdens more speech than necessary to protect the various significant interests discussed in the previous sections of this brief. Petitioners find two provisions of the injunction particularly objectionable: First, they object to the buffer zone provision, which prohibits demonstrations within fifteen feet of clinic entrances and driveways, or within fifteen feet of persons or vehicles coming to or going from abortion facilities, *Pro-Choice Network*, 67 F.3d at 393; second, they object to the "cease and desist" provision, which permits up to two "sidewalk counselors" to enter the 15-foot buffer zone surrounding persons entering or leaving a clinic, but requires the counselors to "cease and desist from such counseling," and retreat from the zone if the person being approached "indicates, either verbally or non-verbally, that they do not wish to be counseled." *Id.* at 391.

Petitioners' argument that these provisions burden too much speech misconstrues both the injunction and this Court's holding in *Madsen*. Not only are these provisions actually narrower in key respects than the injunction provisions approved by this Court in *Madsen*, each of these provisions is well within the scope of equitable discretion provided to the lower courts by the *Madsen* decision.

Thus, Petitioners' challenge to the injunction must be rejected.

As a prelude to discussing the differences between the *Madsen* injunction and the injunction in this case, it is important to note the important ways in which the injunctions are the same. In *Madsen*, this Court upheld an injunction provision imposing a 36-foot buffer zone to the south and east of a clinic in Melbourne, Florida. In three key respects, the 36-foot buffer provision in *Madsen* is indistinguishable from the 15-foot buffer provision here. First, both provisions were devised as "a means of protecting unfettered ingress to and egress from the clinic." *Madsen*, 114 S.Ct. at 2527. *See Pro-Choice Network*, 799 F.Supp. at 1433 ("paragraph (b) of the preliminary injunction secures unfettered access to the clinics. . . ."). Second, both provisions were entered only after the trial courts "found that [protesters] repeatedly had interfered with the free access of patients and staff." *Madsen*, 114 S.Ct. at 2526. *See Pro-Choice Network*, 799 F.Supp. at 1424-27 (detailing District Court's findings regarding systematic blockading of clinics and harassment of clinic patients and staff). Third, both provisions rely upon "a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation." *Madsen*, 114 S.Ct. at 2527. *See Pro-Choice Network*, 799 F.Supp. at 1436 ("the 'cease and desist' provision shields only unwilling listeners from defendants' message"); *id.* at 1437 ("[protesters] can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by.").



To the extent that the provisions of the injunction in this case are different than those in the *Madsen* injunction, the provisions challenged here are actually more speech-protective than the 36-foot buffer zone in that case. Most obviously, in this case the District Court imposed only a 15-foot buffer zone around the entrances and driveways of clinics. This zone is less than half as large as the 36-foot zone upheld in *Madsen*. This is important because unlike the provision upheld in *Madsen*, the buffer zone in this case does not have the effect of pushing demonstrators to the opposite side of the street from the clinic. Under the injunction upheld in this case, demonstrators can remain in close proximity to the clinic entrances, so long as they do not block those entrances. Thus, the demonstrators' placards and signs can be seen easily by those coming into a clinic, and demonstrators will have no trouble communicating verbally with those approaching the clinic entrances. *See Pro-Choice Network*, 799 F.Supp. at 1436.

With regard to the "floating" 15-foot buffer zone around persons approaching or leaving the clinics, Petitioners hyperbolically envision a situation in which "picketers, leafletters, and anyone else who could be characterized as 'demonstrating' must flee from approaching pedestrians on pain of contempt." Pet. Br. at 49. Petitioners paint a picture of being "bulldozed" off the sidewalks by patients going to or coming from clinics: "If a placard-carrying individual should fail to pay close attention in all directions, a 'speech-free bulldozer' may run him over before he has time to conceal his sign." *Id.* Of course, none of these speculations are based on any evidence in the history of this case. No one has ever been held in contempt for coming too close to another

pedestrian while innocently trying to avoid contact with a person en route to a clinic. The reality of the protesters' behavior is quite different, and was noted by the District Court in its opinion issuing the preliminary injunction: "There was testimony adduced at the hearings that defendants have attempted to circumvent [a similar provision in the TRO] by using a 'relay' system, *i.e.*, once the targeted person rejects the counseling of a particular 'sidewalk counselor,' another one steps forward and continues counseling. This 'relay' system obviously violates the spirit, if not the letter, of the Court's TRO." *Pro-Choice Network*, 799 F.Supp. at 1435 n.12. Protesters around clinics in western New York do indeed "pay close attention in all directions," but they do so in order to ambush frightened clinic patients, not to get out of their way.

Evidence such as this points to the necessity of the buffer zone surrounding those going to and from the clinics. In the absence of such a buffer, protesters would have free rein to engage in the very conduct that the District Court found was common among demonstrators outside clinics in the Buffalo area prior to the issuance of the TRO: "During these encounters, 'sidewalk counselors' often become angry and frustrated when patients and patient escorts persist in entering the clinics. The 'counselors' then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering." *Id.* at 1425 (footnote omitted). This Court noted in *Madsen* that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." *Madsen*, 114 S.Ct. at 2529 (quoting *International Society for Krishna Consciousness (ISKCON) v. Lee*, 505 U.S. 672, 684 (1992)). Nothing in *Madsen* or any other First Amendment case provides



protesters the absolute right to engage in aggressive, face-to-face harassment of individuals.

Petitioners repeatedly argue that the buffer zone surrounding individuals entering or leaving a clinic creates a "speech-free zone." *See* Pet. Br. at 44, 45, 46, 47, 48. Although this is an accurate description of the 36-foot buffer zone upheld by this Court in *Madsen* (which contained no exceptions for speech by protesters), it does not accurately characterize the "floating" buffer zone created by the injunction in this case. In this case, the District Court specifically permitted up to two sidewalk counselors to enter the 15-foot buffer zone surrounding individuals, but required such counselors to "cease and desist" their approach if the person approached indicated a desire to be left alone.

Petitioners challenge the "cease and desist" provision by analogizing it to the provision of the *Madsen* injunction prohibiting protesters from approaching persons seeking the services of a clinic within a 300-foot zone around the clinic. This Court struck down that provision on the ground that it prohibited "all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be. . . ." *Madsen*, 114 S.Ct. at 2529. The simple answer to Petitioners' analogy is that the relevant provision in this case does *not* prohibit "all uninvited approaches." In fact, the injunction specifically *permits* such approaches. What the provision *does* prohibit is the forced imposition on a listener of speech that the listener does not want to hear. Petitioners' analogy to *Madsen* is inapt because there is a fundamental difference between an injunction that prohibits someone from "selling" his or her perspective in the marketplace of

ideas, and an injunction that prohibits a speaker from forcing a listener to "buy" the speaker's perspective.

Petitioners' own citations underscore this difference. Petitioners cite Justice Souter's opinion from *ISKCON v. Lee*, in which Justice Souter noted that in the face of an insistent solicitor, "a pedestrian on the street . . . can simply walk away or walk on." *ISKCON v. Lee*, 505 U.S. at 713 (Souter, J., concurring in part and dissenting in part), cited in Pet. Br. at 39. But Petitioners failed to note Justice Souter's reference to the fact that in *ISKCON* "there is here no evidence of any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban. . . ." *Id.* This case is a good example of the "coercive conduct" that Justice Souter recognized might justify a regulation of face-to-face speech. In this case, the District Court had abundant evidence of coercive abuse of clinic patients by protesters. Petitioners fail to acknowledge the District Court's finding that "counselors" often "turn to harassing, badgering, intimidating, and yelling at the patients and patient escorts in order to dissuade them from entering [the clinics]. They continue to do so even after the patients signal their desire to be left alone." *Pro-Choice Network*, 799 F.Supp. at 1425. The "cease and desist" provision in the injunction was thus narrowly tailored to preserve the right of protesters to approach pedestrians peacefully, while at the same time preserving the right of clinic patients to avoid the kind of harassment and abuse that had become common at the time the injunction was issued.

In sum, each provision of the injunction challenged by Petitioners satisfies the *Madsen* requirement that it burden no more speech than necessary to protect clinic



patients and personnel from harassment and coercion. As the Court of Appeals held, the injunction does no more than preserve the rights of patients and clinic personnel, while leaving intact the protesters' First Amendment right to "approach anyone else to attempt to 'counsel' them, or to hand out leaflets to passersby, or to demonstrate as she sees fit within the bounds of the injunction." *Pro-Choice Network*, 67 F.3d at 391.

## CONCLUSION

This Court should affirm the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX A

## 1995 CLINIC VIOLENCE SURVEY REPORT

**Conducted by**
**THE FEMINIST MAJORITY FOUNDATION**

## 1995 CLINIC VIOLENCE SURVEY REPORT
## FEMINIST MAJORITY FOUNDATION

### METHODOLOGY

For the third consecutive year, the Feminist Majority Foundation conducted a nationwide survey of anti-abortion violence that occurred during the first seven months of 1995. In September of 1995, surveys were mailed to 902 clinics in the United States, and American Samoa. Follow-up phone calls to clinics were made in September and October. Surveys were completed by 310 clinics, producing a response rate of 34%. Data were analyzed using SPSS-X (Statistical Package for the Social Sciences) uni-variate and bi-variate statistical techniques. This annual survey represents one of the most comprehensive studies of anti-abortion violence directed at clinics, patients, and health care workers.

The sample of 310 clinics in the 1995 survey includes facilities in 44 states and American Samoa. (See Appendix A for list of number of clinics per state.) The percentage of clinic practice devoted to abortion ranges from less than 5% to over 75%. Clinics represented in the sample are almost evenly divided among facilities that are non-profit (31%), for-profit (38.1%), and private doctors offices (30%).

Many of these clinics provide a wide range of gynecological and other health care services. The 1995 survey found that 94.8% of clinics provide health services in addition to abortion. Clinics provide birth contol (92.6%), cancer screening

(68.1%), pre-natal care (24.8%), menopause treatment (58.1%), tubal sterilization (29.7%), adoption and referral services (22.3%), infertility treatment (26.8%), PMS Treatment (51.6%), AIDS Testing (60%), reproductive health counseling (83.2%), pregnancy counseling (86.8%), and STD testing and treatment (82.3%).

Clinics that responded to the survey were assured that their individual responses would remain confidential. Clinics are identified by name or state only if the incidents and consequences of the violence are a matter of public record or if the Feminist Majority Foundation was given permission to include the details of the incident in this report.

## KEY FINDINGS

- Levels of clinic violence in 1995 declined substantially. In 1995, 38.6% of clinics experienced one or more of the most severe forms of clinic violence, including death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson and arson threats. This rate is down significantly from 51.9% of clinics in 1994 and 50.2% in 1993. The proportion of clinics experiencing one or more types of violence grew to 55.8% when home picketing, vandalism, and gunfire also were tabulated. In 1994, 66.7% of clinics experienced at least one of the twelve types of violence.

- For the first time, in every category of violence, more clinics in 1995 reported decreases than increases in incidents. The smallest net decreases, however, were in reports of death threats and stalking.

- Violence directed at individual physicians and clinic staff members continued at unacceptably high levels. Almost one in five clinics (17.1%) reported death threats in 1995; one in five (20.3%) reported home picketing; and one in ten (10.6%) said clinic staff had been stalked.



- Violence directed at physicians and clinic staff has taken its toll. Clinic staff resignations as a result of anti-abortion violence remained at 1994 levels, with almost one in ten (9%) of clinics having lost clinic staff for this reason. The majority (60.7%) of violence-related staff resignations occurred as a result of the December 30, 1994 murders of clinic workers in Brookline, Massachusetts.

- One in five clinics reported violations of the Freedom of Access to Clinic Entrances Act to federal law enforcement officials, representing an increase from 16.5% in 1995. The majority (54.8%) of clinics reporting FACE violations were directed by federal authorities to seek assistance from local and state laws and law enforcement officials.

- Decreases in clinic violence corresponded with law enforcement response. Local, state, and federal law enforcement officials won higher marks from clinics for their response to anti-abortion violence in the (sic) 1995 than in 1994. The greatest improvement in law enforcement response was seen at the local level, where 34.5% of clinics reported enforcement efforts had "improved."

- Clinic demands for legal remedies from the courts experienced mixed success. In 1995, 15.2% of clinics sought judicial relief from clinic violence, but less than half (46.8%) actually obtained the legal remedy sought. Over one-third (35.5%) of clinics are now protected by a buffer zone or civil injunction.

## RESULTS

### Anti-Abortion Violence Declines in 1995; One-third of Clinics Still Under Serious Attack

One year after passage of the Freedom of Access to Clinic Entrances Act and a U.S. Supreme Court ruling allowing the creation of "buffer zones" around women's health care clinics,

*the level of violence at abortion clinics has declined significantly.* However, *over one-third of clinics remained under serious attack by anti-abortion forces during the first seven months of 1995.*

*In 1995, 38.6% of clinics experienced one or more of the most severe forms of clinic violence.* Types of violence included *death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson threats and arson attacks.* This level of violence represented a drop of 13.3 points from 51.9% of clinics in 1994 and a drop of 11.6 points from 50.2% in 1993. (See Chart 1.)

As Chart 2 shows, 22.3% of clinics in 1995 experienced one type of violence, 10% reported two types, 4.2% were the targets of three types of violence, and .9% experienced four or more types of violence. Chart 2 also compares 1995 levels of violence with 1993 and 1994.

Both the 1995 and 1994 surveys also measured additional types of violence: *vandalism, home picketing, and gunfire.* When these variables are incorporated, *the percentage of clinics that experienced violence in 1995 grows to 55.8%.* In 1994, 66.7% of clinics were the targets of one or more of these ten types of violence.

Collapsing the twelve violence variables into three levels of violence further revealed the decline in intensity of violence between 1995 and 1994. In 1995 14.2% of clinics were heavily targeted experiencing a high level of violence (3 or more types), compared with 22.2% in 1994. In the 1995 survey, 41.6% reported a moderate level of violence (1 or 2 types); 44.5% experienced moderate levels of violence in 1994. In 1995, 44.2% of clinics had not experienced any of these types of violence; one third (33.3%) of clinics in 1994 indicated they had not faced anti-abortion violence.



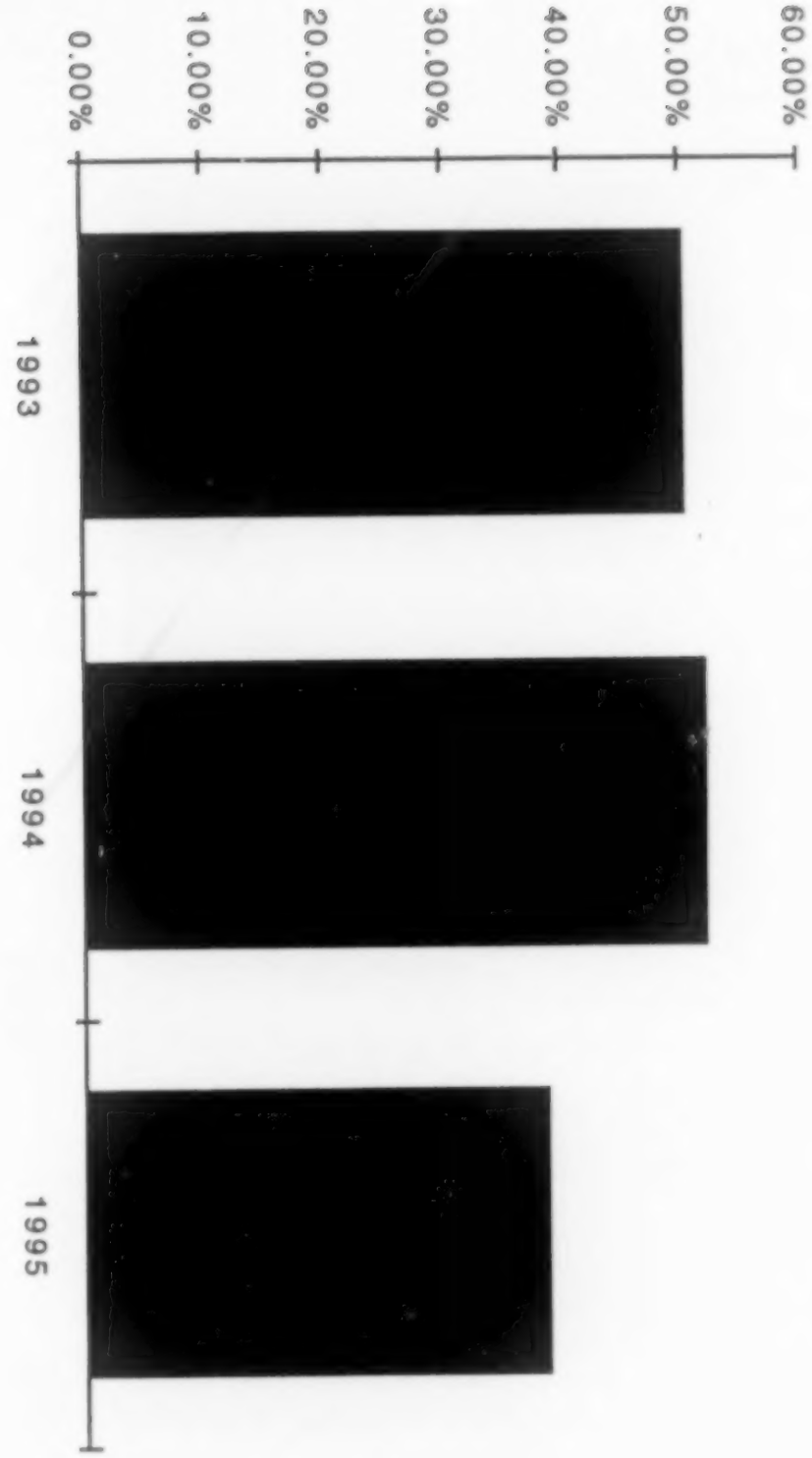
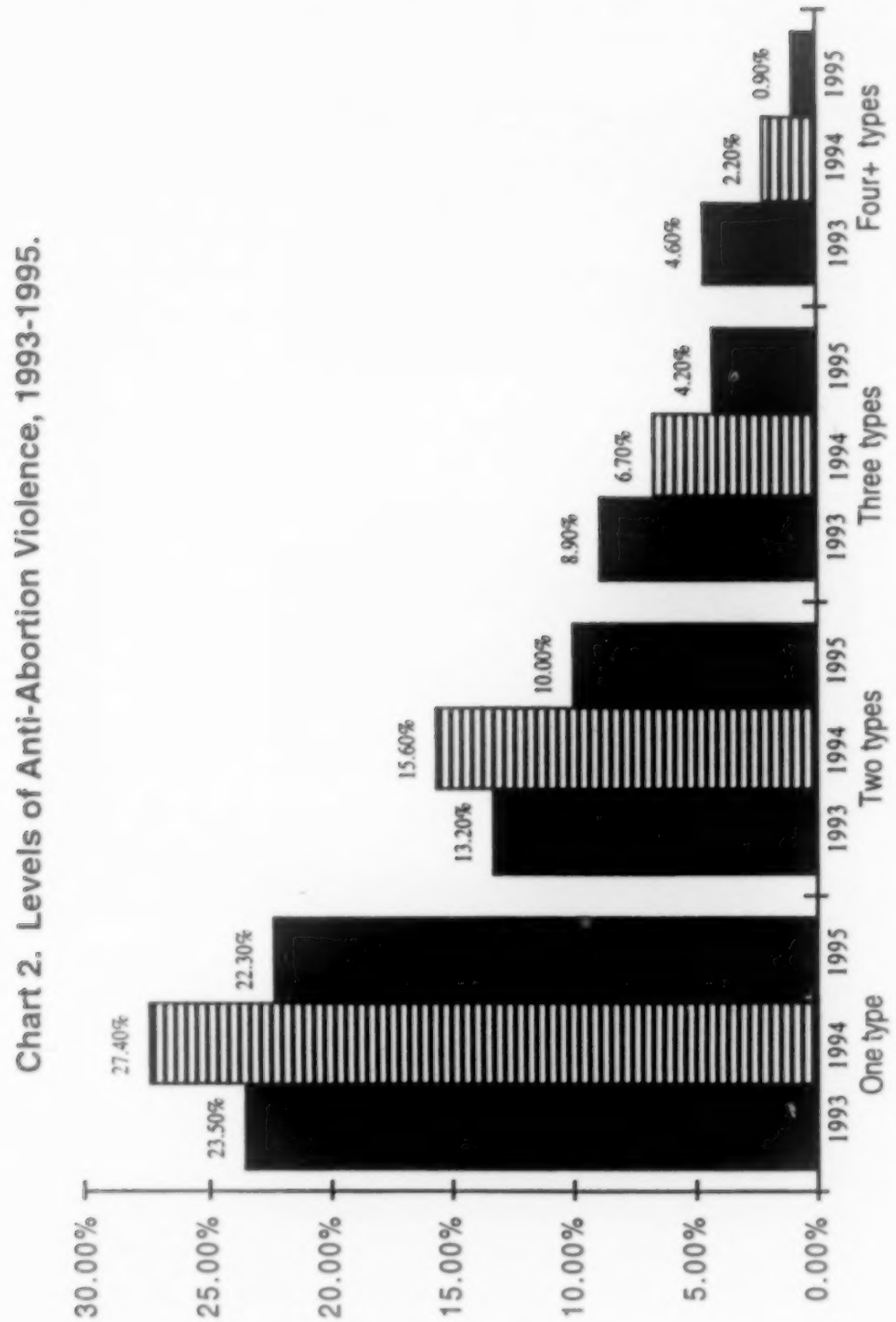



**Chart 1. Clinics Experiencing One or More Types of Anti-Abortion Violence, 1993-1995.**






Violent acts against clinics and health care workers were nationwide. The survey, however, revealed especially severe anti-abortion violence in Alabama, California, Colorado, Florida, Kansas, Massachusetts, North Dakota, North Carolina, Oklahoma, Oregon, Texas, and Wisconsin.

## Death Threats, Home Picketing, and Stalking Still Terrorize Many Physicians and Clinic Workers

While overall clinic violence decreased in 1995, *the types of violence that target physicians and clinic staff at their homes and offices remained at high levels*. Almost *one in five clinics (17.1%) reported death threats* in 1995; *one in five (20.3%) reported home picketing;* and *one in ten (10.6%) said clinic staff had been stalked*. While these reports of death threats, stalking, and home picketing also represented declines since 1994, this violence still posed a significant threat to abortion providers. (See Chart 3).

*Relatively few clinics in 1995 reported blockades (6.5%), invasions (5.8%), or chemical attacks (1%).* Bomb threats were reported by 14.5% of clinics.

Vandalism was the most highly reported type of violence, with almost one-fourth (24.8%) of clinics reporting that their facilities had been vandalized. Acts of vandalism included glue in door locks (5.2%), nails in clinic driveways or parking lots (2.9%), motor oil in parking lot (1.9%), paint on building (8.1%), and broken windows (9.4%). Other forms of vandalism included destruction of property and landscaping, disposal of trash on clinic property, placement of locks on clinic doors and gates, and tampering with clinic utilities such as electricity and water.

***Facing the mobilization of abortion rights activists at clinics, protest injunctions, and buffer zones, anti-abortion extremists largely have abandoned clinic blockade and clinic invasion strategies in favor of more threatening strategies aimed at par-***

9a

**Chart 5. Clinic Reports of Blockades, Invasions, Death Threats, and Stalking , 1993-1995**

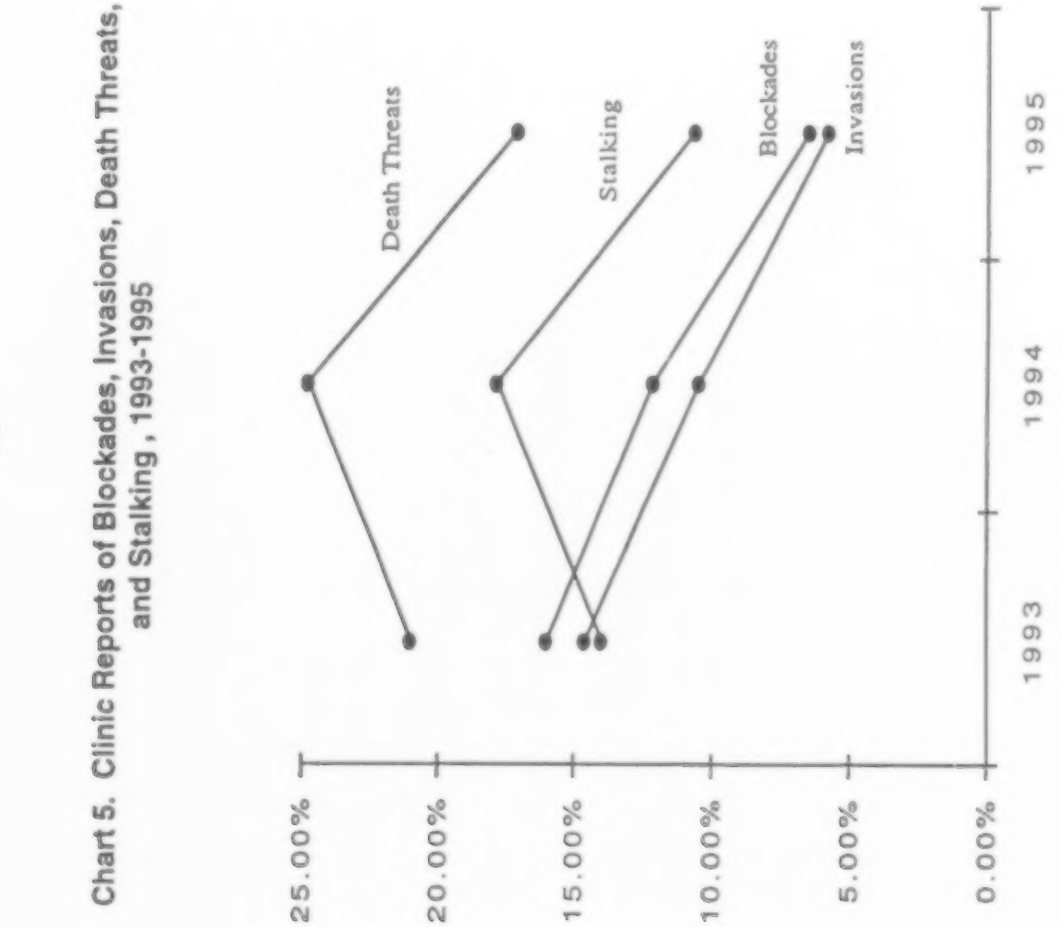



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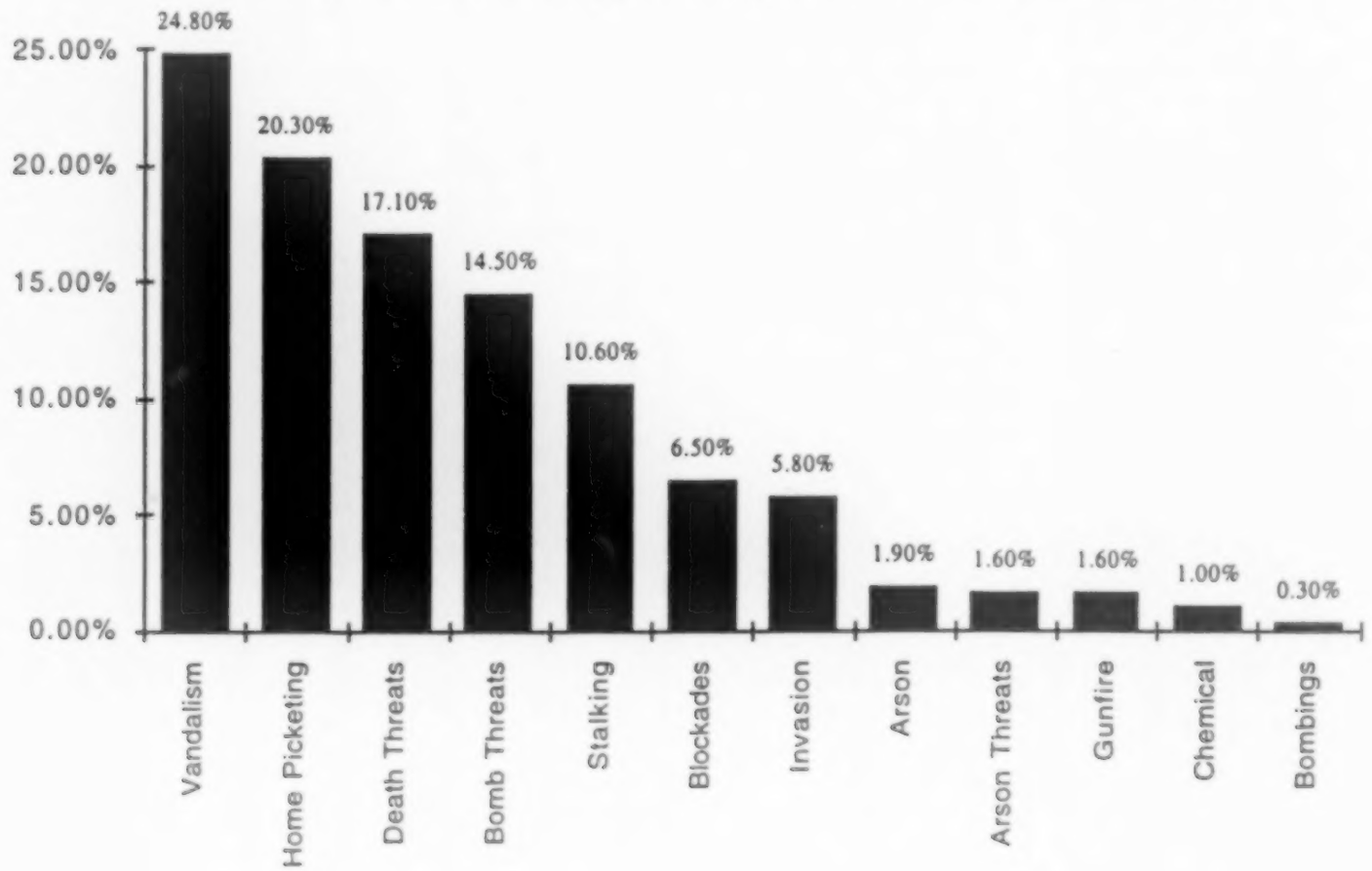
**Chart 3. Violence By Type During First Seven Months of 1995**



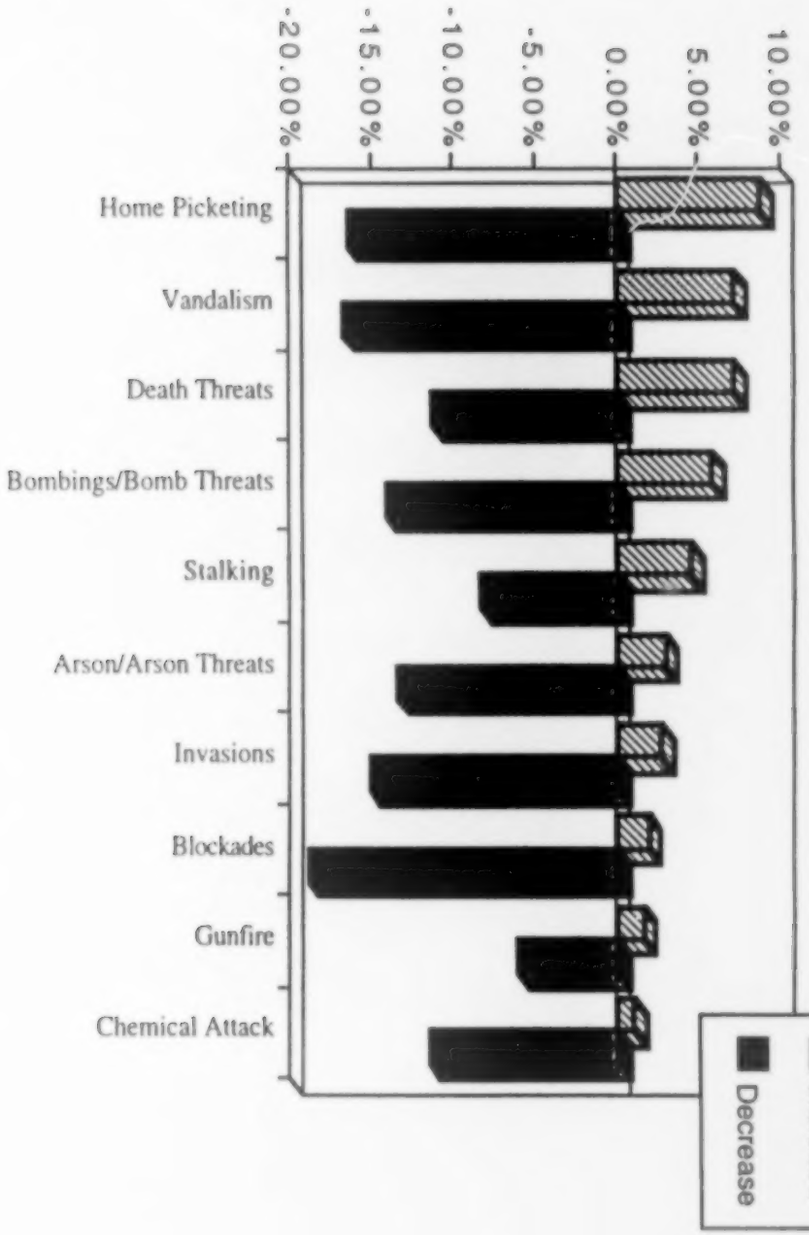



**Chart 5. Increases and Decreases in Types of Violence During First Seven Months of 1995.**



*ticular physyicians and clinic workers such as death threats, stalking, and home picketing*. Chart 5 illustrates the patterns of decline in various types of violence over the past three years, based on our annual surveys.

*For the first time, in every category of violence, more clinics in 1995 reported decreases than increases in incidence*. Chart 5 reveals reported increases and decreases in specific types of violence in 1995, compared with 1994. Significantly, however, *the smallest net decreases occurred in death threats and stalking.*

## One In Ten Clinics Lose Staff As A Result of Anti-Abortion Violence

Clinics continued to lose staff as a result of anti-abortion violence. *In 1995, 9% of clinics reported that staff members had quit as a result of anti-abortion violence and harassment*. A similar number of clinics reported violence-related resignations in 1994. Both 1994 and 1995 levels of staff resignations represented a major decline from 1993, when one-fourth of clinics said they had lost staff members because of fears of violence.

*Clinics which were the most heavily besieged by violence were the most likely to lose staff members*. Of the clinics experiencing high levels of violence, 13.6% said staff members had resigned, compared with 9.3% fo clinics reporting moderate violence and 7.3% of clinics reporting no violence.

The murder of two clinic workers and shooting of five other people in Brookline, Massachusetts on December 30, 1994 sent shockwaves through the nation. The attacks especially intensified fear among staff members at clinics around the country. *Over sixty percent (60.7%) of clinics which reported staff losses as a result of violence in 1995 said those staff members had quit as a direct result of the Brookline murders*.

## One In Five Clinics Reported FACE Violations

*One in five clinics (20%) surveyed said they had reported violations of the Freedom of Access to Clinic Entrances Act (FACE) to federal law enforcement officials* — an increase in reports from 16.5% in 1994.

Enacted in May of 1994, FACE makes anti-abortion violence a federal crime. The Act provides federal jurisdiction and enacts specific federal penalties, including felony offenses and civil fines, for those convicted of using force, the threat of force, or physical obstruction against patients, health care workers, and clinics.

The federal government's enforcement of FACE increased substantially in 1995. According to the Department of Justice, the first full year of FACE implementation resulted in 133 criminal civil rights investigations, 15 indictments, and 15 convictions. Nine FACE civil actions were brought by the federal government. In 1995, the U.S. Supreme Court also rejected the American Life League's challenge to the constitutionality of FACE.

Key events in FACE enforcement in 1995 included the conviction of Paul Hill for the 1994 murders of Dr. John Bayard Britton and clinic escort James Barrett and shooting of June Barrett. A possible murder of a physician was averted in August of 1995 when the FBI arrested Robert Cook, an anti-abortion extremist, who allegedly robbed an armed car of $260,000 and planned to use the money to "fund a war against abortion." Cook was arrested just days before he planned to start his war by killing an abortion doctor. Cook was convicted of FACE violations as well as larceny, money laundering, and solicitation.

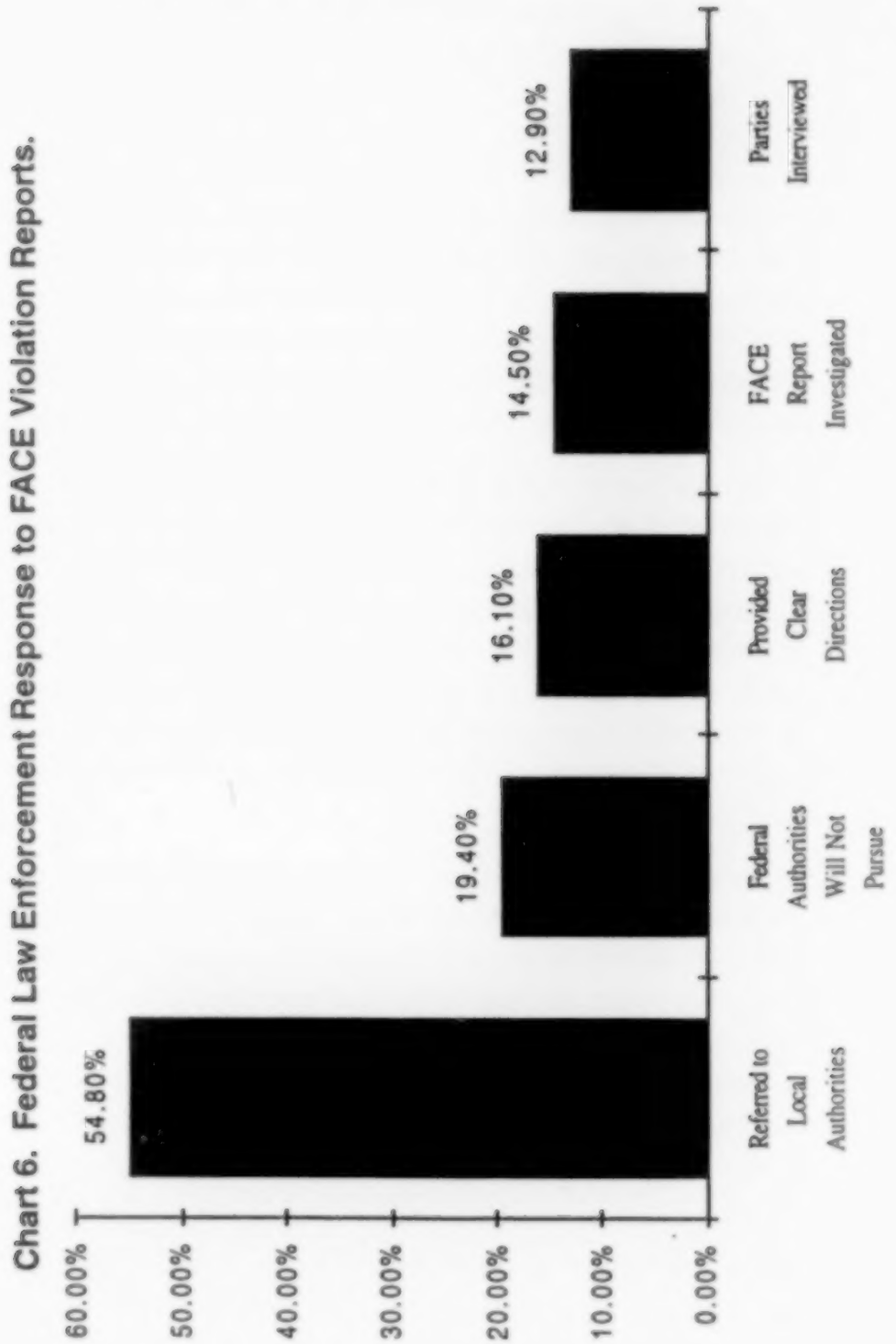
While FACE enforcement steadily improved in 1995, federal officials were still reluctant to use FACE to address many instances of clinic violence. *The 1995 survey found that the majority of FACE reports that clinics made to federal officials were referred to local law enforcement officials.* Of the 62 clinics making FACE reports, 54.8% were told their claims should be handled under local and state laws. *Almost one-fifth (19.4%) of clinics reporting FACE violations said that they were advised that federal authorities would not prosecute.* Only 16.1% of clinics that reported FACE violations said that law enforcement officers provided clear directions for initiating formal FACE complaints. *Only 14.5% of clinics reported that their FACE reports were formally investigated* and just 12.9% said involved parties were officially interviewed. (See Chart 6.)



*Very few clinics reporting FACE violations said their reports had resulted in civil or criminal action under the federal law.* Reported FACE violations resulted in FACE criminal proceedings for only 8.1% of clinics. Only 4.8% of clinics that reported FACE violations pursued FACE civil action. U.S. attorneys intitiated FACE complaints for 8.1% (25) of the clinics. Of the clinics surveyed, one won a FACE civil suite, three won FACE injunctions, and one clinic won FACE criminal charges.

*For-profit clinics were more likely than non-profit clinics or private doctors offices to report FACE violations.* In 1995, 43.5% of FACE violations were reported by for-profit clinics, with non-profit clinics accounting for 30.6% and private doctors offices accounting for 24.2% of FACE reports. This pattern represents a shift from the 1994 data which showed far more non-profit clinics than for-profit or private doctors office facilities reporting violations of FACE.

The majority (60.6%) of clinics said that they had been informed by federal authorities of the appropriate FACE contact in the U.S. Attorneys office in their districts.






## Law Enforcement Response Improved in 1995

*Local, state, and federal law enforcement officials won higher marks from clinics for their responses to anti-abortion violence in the 1995 than in 1994*. Local law enforcement response was ranked as "excellent" by 43.9% of clinics in 1995, with 32.3% calling local law enforcement response "good," and 8.7% of clinics reporting "poor" responses. In 1994, 30.3% of clinics reported that local law enforcement response was "excellent;" 35.4% said local response was "good;" and 11.5% of clinics experienced local response as "poor."

Federal law enforcement received significantly higher ratings from clinics in 1995 than in 1994. Of the clinics, 20.3% reported "excellent" federal response in 1995, with 31% of clinics saying federal response was "good" and 12.9% stating they had experienced a "poor" response from federal officials. In 1994, only 10.5% of clinics had reported an "excellent" response from federal law enforcement, 21.3% said the federal response was "good" and 8% characterized federal response as "poor."

Clinics ranked state law enforcement response lower. State law enforcement response was identified by 15.5% of clinics as excellent, 24.5% as good, and 8.1% as poor. These results, however, showed significant improvement in state response since 1994, when 7.3% of clincis reported state response as excellent, 15.9% as good, and 8.9% as poor.

The 1995 survey results also suggested that clinics were interacting more with law enforcement officials at all levels than in the past. In 1995, only 15% of clinics responded "don't know" to questions about local law enforcement response, compared with 22.9% in 1994. Slightly over one-half of clinics (51.9%) were unable to describe state law enforcement response to clinic violence, but this still represented improvement since 1994 when 67.8% could not characterize state enforcement efforts. Similarly, 35.8% of clinics in 1995 responded

"don't know" when asked to rank federal law enforcement response, compared with 60.2% in 1994.

Another measure found a significant number of clinics in 1995 interacted with federal officials. Over two-thirds (68.1%) of clinics reported that they had been contacted by U.S. marshals about clinic violence.

Most clinics reported little change in local, state, or federal response to clinic violence when asked to compare 1995 levels of response with their experiences in 1994. The plurality of clinics said local (46.1%), state (40.6%), and federal (42.3%) response "remained the same" as in the previous year. Very few clinics reported that law enforcement response at any level had declined.

Clinics reported the most improvement in local law enforcement response, followed by federal response. Of the clinics, 34.5% said local law enforcement response had "improved," while 26.5% noted improvements in response from federal law enforcement. 17.7% of clinics said state law enforcement response had "improved."

### Levels of Violence Correlate with Law Enforcement Response

*A clear relationship between clinic violence and law enforcement response emerged from the 1995 survey data.* Only 11% of clinics reporting excellent local law enforcement experienced high levels of violence, compared with 33.3% of clinics who reported poor law enforcement response.

A similar pattern appeared in relation to state law enforcement response. Of those clinics experiencing a poor state law enforcement response, 28% report high levels of clinic violence; only 14.6% of clinics reporting excellent state law enforcement response experienced high levels of violence.



*Death threats, in particular, are consistently related to local, state, and federal law enforcement response.* Better law enforcement response corresponded with fewer death threats. Bombings/bomb threats, vandalism, and death threats had statistically significant relationships with federal law enforcement response. Statistically significant relationships also were found between local law enforcement response and death threats, stalking, vandalism, blockades, and invasions. Stalking and death threats were the only two types of violence that correlated with state law enforcement response at a significant level.

Another indication of law enforcement response was the number of clinics that reported arrests and whether charges were filed in these cases. *Only 13.8% (43) of clinics reported arrests as a result of violence at clinics.* Of the clinics, 11.6% (36) reported misdemeanor arrests or arrests for violation of local ordinances; 1.6% (5) reported felony arrests; and .6% (2) reported both misdemeanor/felony.

Arrests were clearly related to the levels of violence experienced by clinics. Clinics that experienced higher levels of violence indicated more arrests regardless of whether the violent acts took place at or away from clinics. Over one-third (36.3%) of the clinics that experienced a high level of violence reported arrests for felonies and misdemeanors committed at clinics. Only 14.7% of clinics affected by moderate levels of violence reported arrests for anti-abortion activities at the clinics. Of the clinics that reported high levels of violence, 11.4% noted either felony or misdemeanor arrests related to violence that took place away from clinics. Only 3.9% of clinics that reported moderate levels of violence also indicated arrests for conduct away from clinics.

*Approximately one-third of clinics that reported misdemeanor and local ordinance arrests also indicated that charges were filed*

*as a result of the arrests*. Of the 36 clinics reporting misdemeanor/local ordinance arrests related to anti-abortion violence at clinics, 33.3% said charges were filed and another 5.6% said charges were filed in some cases, but not others. Of the 8 clinics that reported misdemeanor/local ordinance arrests related to anti-abortion violence targeted at physicians and staff away from clinics, 37.5% said charges were filed. All of the clinics that reported felony arrests said charges were filed. One of the two clinics that reported both felony and misdemeanor arrests related to violence at clinics said charges were filed.

### Less Than Half of Clinics Won Legal Protections

*Over one-third (35.5%) of clinics are currently protected under civil injunctions or buffer zones.*

*In 1995, 15.2% of clinics turned to the courts to seek relief from clinic violence*. Of the clinics, 3.2% sought temporary injunctions, 5.8% permanent injunctions, and 4.2% restraining orders.

*Only 46.8% of clinics who sought legal remedies actually obtained the desired protection*. Clinics in 1995 were less successful than in 1994 in winning restraining orders and temporary injunctions to protect themselves from clinic violence. In 1995, 46.2% of the clinics requesting temporary restraining orders against anti-abortion extremists won restraining orders, compared with 68.8% in 1994. Fifty percent of clinics who sought temporary injunctions in 1995 won those injunctions, in comparison to 62.5% of clinics in 1994.

On the other hand, *clinics in 1995 were extremely successful in obtaining permanent injunctions*. All but 5 of the 18 clinics that sought permanent injunctions won those injunctions, for a total of 72.2%. In 1994, only 27.8% of clinics seeking permanent injunctions won that legal remedy.



## CONCLUSIONS

Levels of clinic violence in 1995 declined substantially. Fewer clinics reported incidents of death threats, stalking, home picketing, vandalism, chemical attacks, blockades, arson and arson threats, invasions and gun fire. In every category of violence, more clinics reported decreases than increases.

Violence directed at individual physicians and clinic staff, however, continues at unacceptably high levels. Almost one-fifth (17.1%) of clinics reported death threats in 1995. A similar proportion (20.3%) of clinics indicated that the homes of clinic staff and physicians had been picketed. One in ten (10.6%) clinics said staff and physicians had been stalked by anti-abortion extremists. Of all the types of violence, death threats had the smallest net decrease in 1995.

And these types of violence have taken their toll on clinic staff. One in ten clinics still report that staff members have quit as a result of anti-abortion violence. The murders of clinic staff in Brookline Massachusetts by John Salvi accounted for almost two-thirds of these resignations.

Decreases in clinic violence were tied directly to law enforcement response. The survey found statistically significant correlations between levels of violence and local, state, and federal law enforcement response. The level of death threats appeared to be particularly sensitive to law enforcement activities. Death threats were the only types of violence in which a statistically significant relationship was indicated with local, state, *and* federal law enforcement activities.

Clinics consistently reported that law enforcement at the local, state, and federal levels had improved. These improvements without question have helped diminish anti-abortion violence overall. However, clinics also reported that implementation of the Freedom of Access to Clinic Entrances Act has

not been as vigorous as it could be. Although one in five clinics reported FACE violations, very few of these reports resulted in criminal or civil action. Enforcement of FACE and the increased involvement of federal and state as well as local officials clearly is necessary to end the serious violence which continues to plague a significant proportion of clinics in the United States.



## APPENDIX A
## Clinics Responding to Survey State-by-State

| | |
|---|---|
| Alabama | 7 |
| Arizona | 10 |
| Arkansas | 3 |
| California | 41 |
| Colorado | 5 |
| Connecticut | 10 |
| Florida | 24 |
| Georgia | 4 |
| Illinois | 5 |
| Indiana | 5 |
| Iowa | 5 |
| Kansas | 5 |
| Kentucky | 1 |
| Louisiana | 4 |
| Maine | 2 |
| Maryland | 9 |
| Massachusetts | 5 |
| Michigan | 16 |
| Minnesota | 5 |
| Mississippi | 1 |
| Missouri | 2 |
| Montana | 3 |
| Nebraska | 1 |
| Nevada | 4 |
| New Hampshire | 3 |
| New Jersey | 8 |
| New Mexico | 2 |
| New York | 22 |
| North Carolina | 10 |
| North Dakota | 1 |

| | |
|---|---|
| Ohio | 16 |
| Oklahoma | 2 |
| Oregon | 5 |
| Pennsylvania | 7 |
| Rhode Island | 2 |
| South Carolina | 2 |
| South Dakota | 1 |
| Tennessee | 6 |
| Texas | 17 |
| Utah | 2 |
| Vermont | 5 |
| Virginia | 5 |
| Washington | 9 |
| Wisconsin | 5 |
| American Samoa | 1 |
| | 310 |



## APPENDIX B
## State-by-State Analysis For Twelve States With Highest Levels of Anti-abortion Violence During the First Seven Months of 1995

***Alabama***

Four of the seven Alabama clinics received death threats. Three clinics received bomb threats. One clinic received an arson threat. Three clinics were vandalized. One clinic reported staff members had been picketed at home. Three clinics reported stalking. One clinic said staff had quit as a result of anti-abortion violence. Four clinic reported FACE violations. One clinic is protected by an injunction or buffer zone.

***California***

Only four out of forty-one clinics in California reported blockades. Three clinics faced invasions. Nine clinics received bomb threats. Two clinics experienced arson. Twelve clinics experienced vandalism. Four clinics reported home picketing. Four clinics reported death threats. One clinic reported gunfire. Two clinics reported violence-related staff resignations. Six clinics informed authorities of FACE violations. Six clinics said they were protected by buffer zones or injunctions.

***Colorado***

One of the five clinics in Colorado was invaded during the first seven months of 1995. A bomb threat was received by one clinic. Two clinics were vandalized. One clinic said staff experienced home picketing. Two clinics reported staff members had been stalked. Two clinics reported death threats. Two clinics lost staff as a result of violence. Two clinics told federal authorities of FACE violations. One clinic reported a suit for civil damages had been filed under FACE. Two clinics said they had buffer zones or injunctions.

***Florida***

Only one of twenty-four clinics in Florida reported blockades. One clinic received a bomb threat. One clinic was set on fire. Four clinics reported vandalism. Three clinics reported home picketing. Two clinics reported that staff members had been stalked. Four clinics received detah threats. One clinic reported staff resignations as a result of clinic violence. Four clinics reported FACE violations. Buffer zones or injunctions are in place at nine clinics.

***Kansas***

One of the five Kansas clinics experienced arson. Two clinics were vandalized. Two clinics said staff were picketed at home. Two clinics reported stalking. Three clinics received death threats. One clinic informed federal authorities of FACE violations. One clinic reported a FACE civil suit had been filed. One clinic reported FACE criminal charges had been filed. One clinic has a buffer zone or injunction.

***Massachusetts***

Three of the five Massachusetts clinics reported bomb threats. One clinic reported home picketing. Staff members at two clinics were stalked. Death threats were received by three clinics. One clinic reported gunfire. One clinic reported staff members had quit as a result of anti-abortion violence. One clinic reported FACE violations. Five clinics are protected under an injunction.

***North Carolina***

Three out of the ten North Carolina clinics experienced blockades in the first seven months of 1995. Two received bomb threats. Four clinics were vandalized. Three clinics reported staff members had been picketed at home. Two clinics had staff members who had been stalked. Four clinics reported death threats. Four clinics told federal authorities of FACE violations. Two clinics reported FACE criminal



charges had been filed. Two clinics are protected by buffer zones or injunctions.

***North Dakota***

The lone North Dakota clinic reported home picketing, death threats, and stalking. The clinic also reported FACE violations to federal officials. A buffer zone or injunction was in place at the clinic.

***Oklahoma***

One of the two clinics from Oklahoma in the sample was hit by a blockade. One clinic was vandalized. One clinic said staff were picketed at home. Staff members of one clinic were stalked.

***Oregon***

One of the five Oregon clinics reported a blockade. Two clinics were invaded. One clinic experienced vandalism. All five clinics reported picketing at the homes of staff members and physicians. One clinic reported death threats. One clinic reported staff had quit because of anti-abortion violence. FACE violations were reported at one clinic. One clinic reported FACE criminal charges had been filed. Four clinics have buffer zones or injunctions.

***Texas***

Only two out of seventeen Texas clinics experienced blockades. Four clinics reported invasions. Three received bomb threats. Four clinics were vandalized. Five clinics reported home picketing. Death threats were received by two clinics. One clinic reported gunfire. Two clinics said staff quit as a result of clinic violence. Three clinics reported FACE violations. Eight clinics are protected by buffer zones or injunctions.

***Wisconsin***

One clinic in Wisconsin was invaded, and one received a bomb threat. Four of the five clinics were vandalized. Three clinics reported home picketing. Three clinics said staff members had been stalked. Three clinics reported death threats. FACE violations were reported at two clinics. One clinic reported FACE criminal charges have been filed. Four clinics have buffer zones or injunctions.

No. 95-1065

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
OCT 1996
CLERK

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
*Petitioners*,

—v.—

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,
*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, CATHOLICS FOR A FREE CHOICE, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC., FAMILY PLANNING ADVOCATES OF NEW YORK STATE, INC., JEWISH WOMEN INTERNATIONAL, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL ORGANIZATION FOR WOMEN, NORTHWEST WOMEN'S LAW CENTER, WOMEN'S LAW CENTER OF MARYLAND, WOMEN'S LAW PROJECT, AND YWCA OF THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Dated: July 1, 1996

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This *amicus curiae* brief is submitted in support of Respondents Pro-Choice Network of Western New York, *et al.* By letters already filed with the Clerk of the Court, Petitioners and Respondents have consented to the filing of this brief.

## INTEREST OF AMICI CURIAE

The American Medical Women's Association, American Public Health Association, Catholics for a Free Choice, Connecticut Women's Education and Legal Fund, Inc., Family Planning Advocates of New York State, Inc., Jewish Women International, Lambda Legal Defense and Education Fund, National Center for Lesbian Rights, Northwest Women's Law Center, National Organization for Women, Women's Law Center of Maryland, Women's Law Project, and YWCA of the U.S.A. are advocacy and/or educational organizations that seek to ensure women's equal rights and to protect women's access to safe reproductive health care. *Amici curiae* have a particular interest in halting the concerted violence, harassment and intimidation being directed against women seeking abortions and against clinics, physicians and staff providing abortion services. *Amici* seek to ameliorate the current public health and public safety crisis resulting from the violence and climate of fear created by anti-choice militants and the resultant shortage of physicians and clinics willing to provide abortion services. Individual statements of interest of each *amici* are attached hereto as Appendix A.

## SUMMARY OF ARGUMENT

*Amici curiae* respectfully urge this Court to uphold the decision of the *en banc* United States Court of Appeals for the Second Circuit (hereinafter "Court of Appeals"). This Court has "regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *United States v. Grace*, 461 U.S. 171, 177-78 (1983) (citing *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966)). The district court fulfilled this need to take account of the context in which expressive activity occurs by issuing a measured response to a persistent campaign of obstructive, coercive, and harassing conduct by Petitioners and their co-defendants (hereinafter "Petitioners" or "defendants") targeted at women who seek abortions and the clinics, physicians and staff who provide these essential services in the Western District of New York. While the constitutionality of the limited restrictions on Petitioners' intimidating and disruptive activities is amply supported by the State's interests in protecting women's reproductive rights and public safety (*see* Brief of Respondents), *amici* focus on additional grounds of support recognized by this Court: The permeable buffer zone and the cease and desist provision are constitutional under this Court's well-established privacy doctrines regarding captive audiences and notice remedies.

Because the injunction protects from serious harm a captive audience exercising the constitutional right to reproductive choice, and because it does not preclude many forms of communication that could reach the targeted audience, it must be upheld as constitutional. *See Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994). This Court has firmly established the constitutionality of restrictions on harassment and coercion targeted at a captive audience. *Frisby v. Schultz*, 487 U.S. 474 (1988). Here, patients seeking time-sensitive health services in order to exercise their right to reproductive privacy cannot avoid the invasive and offensive maneuvering of the protesters and so-called "sidewalk counselors," subjecting them to serious physical and psychological harm. These patients thus comprise a "captive



audience" entitled to the protection of the limited restrictions the district court ordered to afford them access to medical facilities. These narrowly drawn provisions burden no more speech than necessary because they ensure that Petitioners have alternative avenues of communicating their message. They therefore pass muster under *Madsen* and reflect a proper balance between the privacy rights and health needs of patients and the rights of those who seek to deter them from exercising their constitutionally protected choice.

Further support for the cease and desist provision's constitutionality is found in the fact that it is appropriately conditioned on notice of unwelcomeness given by the listener. This Court has squarely held that it is constitutional to restrict speech based on notice communicated by a listener that further communication is unwanted. *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

The constitutionality of the challenged restrictions is also supported by analogous decisions in the contexts of domestic violence and sexual harassment. In these settings, courts have protected unwilling listeners' privacy rights by limiting harassing and intimidating speech and activities that cause harm to the recipients. In light of well-established jurisprudence upholding against First Amendment challenge protective orders to remedy domestic violence, and injunctions to prevent continuing sexual harassment in the workplace, this Court similarly should find that the challenge to the instant injunction is without merit.

## ARGUMENT

### I. The Buffer Zone And The Cease And Desist Provision Are Constitutional Because They Protect A Captive Audience Exercising The Right To Reproductive Privacy.

This Court repeatedly has emphasized that the "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Soc'y For Krishna*

*Consciousness*, 452 U.S. 640, 647 (1981) (citations omitted); *see also Grace*, 461 U.S. at 177-78. In particular, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan*, 397 U.S. at 736. Courts protect this important privacy right through application of the captive audience doctrine.

Through this doctrine, courts account for the difference between generalized speech and speech or expressive conduct directed at an individual by protesters who "do not seek to disseminate a message to the general public, but to intrude upon the targeted [individual], and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. Accordingly, government can limit discourse where "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971). This principle carries even greater force in the reproductive health care context. The injunction at issue responds to an intolerable invasion of the privacy rights of individuals seeking to enter women's medical facilities. The buffer zone and the cease and desist provision ensure that those "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526 (quoting *Operation Rescue v. Women's Health Center, Inc*, 626 So.2d 664, 673 (Fla. 1993)), can freely exercise their constitutional right to reproductive privacy and can avoid having their health endangered through badgering and intimidation by abortion opponents.

### A. The Captive Audience Doctrine Applies Here Where Patients Are Seeking Access To Reproductive Health Care Facilities.

This Court has recognized that government may regulate speech in order to protect an unwilling listener or viewer when that listener or viewer is a "captive audience." *Frisby*, 487 U.S. at 487. Given that the invasive anti-choice activities at issue here target and "capture" an audience at a medical facility attempting to exercise the right to reproductive privacy, the captive audience doctrine clearly applies here.



In *Frisby*, this Court upheld a town ordinance banning targeted picketing on the public streets[1] in front of private residences. The Court found "the target[s] of the focused picketing" to be "captive" because they had "no ready means of avoiding the unwanted speech." 487 U.S. at 487. Although "complete bans" on expressive activity in residential neighborhoods are unconstitutional, *see id.* at 486, the Court recognized that anti-choice picketing of the homes of doctors who perform abortion is an "activity [that] inherently and offensively intrudes on residential privacy," *id.* at 486, and noted that the Town Board justified the ban because targeted residential picketing "causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants." *Id.* at 477 (alteration in original).

While "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech," *Cohen*, 403 U.S. at 21 (citation omitted), this Court has responded with equal force to

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[1] In its *amicus* brief, the AFL-CIO misleadingly describes a "spectrum" of cases: on one end are cases, such as *Frisby*, "that recognize a heightened privacy interest in the home;" on the other end are cases "involving speech on the ordinary public street." Brief of AFL-CIO at 28. This mistaken analysis is highlighted by *Frisby* itself, where the speech at issue took place on public streets and sidewalks. In fact, the Court regularly protects targeted audiences from speech occurring in public spaces that are unsuited for unfettered expression; there is no right to "address a group at any public place and at any time." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (*"Cox I"*) (Black, J., concurring in part, dissenting in part). *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (upholding prohibition of solicitation of votes and display or distribution of campaign materials within 100 feet of polling place); *Grayned v. Rockford*, 408 U.S. 104 (1972) (upholding ban on picketing near school); *Cox v. Louisiana*, 379 U.S. 559 (1965) (*"Cox II"*) (upholding prohibition of certain picketing near courthouse). As *Frisby* makes clear, what is dispositive in a "captive audience" analysis is not whether the speech occurs in public, but rather whether it intolerably intrudes on the privacy of its target either because of special privacy interests implicated or because of the degree of captivity.

the need to protect certain captive audiences outside the home. For example, in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), a plurality of the Court upheld a prohibition on political advertisements in public streetcars in part because the passengers were a captive audience. *See also Lehman*, 418 U.S. at 305-08 (Douglas, J., concurring); *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978) (prohibiting daytime broadcast of indecent radio show heard in the car while father was driving with young son). The Court likewise has found that children at assemblies or graduation ceremonies in school are captive audiences. *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *Lee v. Weisman*, 505 U.S. 577, 630 (1992) (Souter, J., concurring). Moreover, even where a citizen is on a public street, the Court has applied captive audience principles to protect her from unavoidable speech. In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court upheld a regulation prohibiting vehicles from emitting loud broadcast noises while on city streets. The Court stated that "[i]n his home or *on the street* [the unwilling listener] is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality." *Id.* at 87 (emphasis added).[2]

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[2] That the home has not been the determinative factor in captive audience cases is further supported by cases in which a captive audience argument was rejected. *See, e.g., Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983) (recipient of objectionable mailing can easily avert eyes and discard mail); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (same). Rather than being dispositive, presence in the home has lightened the burden on the listener to avoid unwanted speech because of the substantial privacy interests involved. *See Frisby*, 487 U.S. at 484 ("the home is different" because it is not one of the "many locations [where] we expect individuals simply to avoid speech they do not want to hear"); *FCC*, 438 U.S. at 749 n.27 ("Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away."); *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975) ("burden normally falls upon the viewer" to avoid speech); *Cohen*, 403 U.S. at 21. Thus, the Court in these cases did not

(continued...)



In short, "rights of 'captive audiences' to be free . . . of unwanted speech . . . [exist] even in traditional fora . . . when circumstances indicate a heightened need to protect the right of the [viewer or] listener to be left alone." *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 392 (2d Cir. 1995). Such a heightened need to protect captive audiences exists where "substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen*, 403 U.S. at 21, or where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik*, 422 U.S. at 209. The present context provides a classic example of a captive audience entitled to protection because the privacy interests, the potential harm, and the degree of captivity are great.

### 1. The Injunction Appropriately Protects Patients' Substantial Privacy Interests.

The privacy interests involved here are substantial; in fact, they are even stronger than the residential privacy protected in *Frisby*.[3] First, this case involves patients entering medical

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[2] (...continued)
dismiss the captive audience argument out of hand if the home was not implicated, but, instead, found that the viewer or listener could avoid the objectionable speech.

Given the substantial privacy interests at stake here, as in *Frisby*, the patients should not bear a heavy burden to avoid the intimidating and offensive speech. In other words, patients at a reproductive health care should not be forced to "escape" unwanted speech. However, even if the burden did fall upon them, the patients here cannot avoid the speech. *See infra.*

[3] As the Florida Supreme Court stated in *Madsen:*

> The *[Frisby]* reasoning applies with even greater force where the object of targeted picketing is the medical patient seeking treatment, rather than the home-dweller. While targeted picketing of the home threatens the psychological well-being of the

(continued...)

facilities, not "the rough-and-tumble world of politics." Brief of Family Research Council at 25. As this Court has recognized, medical settings demand tranquility:

> Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and [her] family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.

*Madsen*, 114 S. Ct. at 2528 (alteration in original) (citations omitted);[4] *see also NLRB v. Baptist Hospital*, 442 U.S. 773 (1979) (recognizing right to ban solicitation in hospitals where such activity interferes with patient care); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (same); *Frye v. District 1199*, 996 F.2d 141 (6th Cir. 1993) (in response to disruption caused by striking nursing home workers outside facility, court upholds injunction limiting number of picketers to three and prohibiting picketing within twenty-five feet of nursing home driveway). Privacy is thus critical to patients seeking care at medical facilities, who are no more "free to come and go", Brief for Petitioners at 42, than are residents of a home. *See Pro-Choice*

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[3] (...continued)

> "captive" resident, targeted picketing of the hospital or clinic threatens not only the psychological but the physical well-being of the patient held "captive" by medical circumstance.

*Operation Rescue*, 626 So. 2d at 673.

[4] *See also Pro-Choice Network*, 67 F.3d at 389 (quoting *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1433-34 (W.D.N.Y. 1992)) ("Here, in the context of health care facilities treating women who are already undergoing the stress normally associated with having an abortion, there is an attendant need for a calm, quiet, stress-free atmosphere.").



*Network*, 799 F. Supp. at 1434 (defendants' "noisy, disruptive, invasive, threatening and intimidating activities are clearly inappropriate in such a setting").

Privacy in this context also implicates autonomy. "The right to make our own choices is essential to our conception of ourselves as free thinking, independent, autonomous individuals." Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 Hastings Const. L.Q. 85, 108 (1991); *see Pro-Choice Network*, 799 F. Supp. at 1435 ("To think as one chooses, to believe as one wishes, are important aspects of the constitutional right to be let alone.") (quoting *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)). Integral to this autonomy is "the ability to choose for ourselves what ideas and thoughts we want to be exposed to." Strauss, *supra*, at 110. This Court has long recognized that this right to privacy encompasses not only personal decisions generally, but particularly decisions involving abortion and procreation. *See Roe v. Wade*, 410 U.S. 113, 153-54 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("[t]hese matters[] involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").[5] Accordingly, women who seek access to medical facilities in order to exercise their constitutionally-protected right to reproductive privacy are entitled to protection from the invasive activities of the defendants, which infringe upon this right by impeding their ability both to make reproductive choices free from unwanted intrusions and to effectuate these choices.[6]

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[5] *See also Hill v. City of Lakewood*, 911 P.2d 670, 675 (Colo. Ct. App. 1995) (impermissible to "limit[] . . . the right of a private citizen to determine whether to permit others to confront [her] concerning medical care or treatment"), *cert. denied*, No. 95SC593, 1996 Colo. LEXIS 136 (Feb. 26, 1996).

[6] In addition, the constitutional right of "informational privacy," protecting the confidentiality of women seeking abortions, *see Casey*, 505 U.S. at 898, 901 also supports an application of the captive

(continued...)

## 2. Absent The Injunction, Patients Would Be At Risk Of Substantial Harm.

The need to protect a captive audience seeking reproductive health care is highlighted by the severe harms caused by defendants' tactics.[7] The hostile and intimidating confrontational tactics employed by anti-choice individuals severely endanger women's health: "This harassment and intimidation causes stress and sometimes even physical injury to the patients . . . and generally disrupts the atmosphere necessary for rendering safe and efficacious health care." *Pro-Choice Network*, 67 F.3d at 383. As exemplified by the experiences in the instant case, these harassing and charged encounters impede women's access to necessary health care at crucial moments, and in some cases produce traumatic physical and psychological effects.[8]

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[6] (...continued)
audience doctrine here. Defendants invaded this informational privacy by videotaping women seeking access to the clinics, as well as their vehicles and license plates, in order to create the legitimate "fear that their identities might be revealed." *Pro-Choice Network*, 799 F. Supp. at 1426.

[7] These harms are greater than those relied on by this Court in *Frisby*, where the Court did not rely on any showing that the picketing caused harm to the targeted abortion provider or his family. At a minimum, to intrude upon the privacy of the patients here in such a harmful way is as "especially offensive" as was the targeted residential picketing in *Frisby*. 487 U.S. at 486.

[8] These effects are particularly detrimental for women who need an abortion to protect their health, such as when they suffer from preeclampsia, eclampsia, hemorrhaging, diabetes, kidney disease, lupus, congenital heart disease and advanced coronary artery disease, and cancer. *See Williams Obstetrics* 790-92 (F. Gary Cunningham et al. eds., 19th ed. 1993); D. Danforth and J. Scott, *Obstetrics & Gynecology* 433, 441-42, 494-97 (5th ed. 1986); G. Burrow & T. Ferris, *Medical Complications During Pregnancy* 41 (3d ed. 1988); C. Pauerstein, *Clinical Obstetrics* 630, 647 (1987); *Rovinsky and Guttmacher's*

(continued...)



Patients are targeted for harassment immediately prior to, during, and after a surgical procedure.[9] As detailed by the district court, coercion and intimidation at this time heighten the health risk for women. "Women who have been the target of 'sidewalk counseling' or other 'rescue' demonstrations usually enter the medical facilities visibly shaken and severely distressed." *Pro-Choice Network*, 799 F. Supp. at 1427. Stress and anxiety cause hypertension and elevated blood pressure, and often require sedation or special counseling; "[p]atients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery." *Pro-Choice*

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[8] (...continued)
*Medical, Surgical & Gynecological Complications of Pregnancy* 512-15 (S. Cherry et al eds., 3d ed. 1985). Women who are compelled to terminate their pregnancies due to severe fetal anomalies, because their pregnancies result from rape or incest, or for many other personal and moral reasons also are at risk of significant harm as a result of defendants' activities.

[9] Here, as in *Madsen*, "the picketing is directed primarily at patients and staff of the clinic." 114 S. Ct. at 2527. Certain women visiting the clinics are especially pegged for abuse: "The 'sidewalk counselors' target younger-looking women because they are the ones most likely to be seeking an abortion. They also target cars that arrive at the facilities with out-of-state license plates. . . ." *Pro-Choice Network*, 799 F. Supp. at 1425.

Whether it be intimidating a woman by crowding her or bounding her after she requests no further face-to-face "counseling," "the temptation and opportunity for coercion or obstruction are at their greatest." *Pro-Choice Network*, 67 F.3d at 396 (citing *Frisby*, 487 U.S. at 486). *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (upholding content-based statutory restriction on employer speech because risk of nonpersuasive coercion great in labor relations setting); *Lee v. International Society for Krishna Consciousness*, 505 U.S. 672, 684 (1992) (upholding ban on solicitation at airport because "face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.").

*Network*, 799 F. Supp. at 1427.[10] These conditions, in turn, will force physicians to anesthetize their patients with higher doses of sedatives or, if the hypertension is severe, to turn the patient away altogether. *Id.* In some instances, these conditions "lead[] to incomplete or inaccurate health history reports which the client completes soon after entry to the [clinic]." *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 859 F.2d 681, 683 (9th Cir. 1988). Moreover, the stress from anti-abortion demonstration tactics can prolong a patient's recovery time, *see, e.g., American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 662 (E.D. Pa. 1985), and often adversely affect a patient's post-operative psychological health, *see* Catherine Cozzarelli & Brenda Major, *The Effects of Anti-Abortion Demonstrators and Pro-Choice Escorts on Women's Psychological Responses to Abortion*, 13 Journal of Social &

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[10] Among the plethora of tactics used by the protesters to stress patients is the invasion of their personal space. Dr. Alice Hoagland, an expert in behavioral medicine and "social impact theory," testified that invasions by a large number of people can be a significant adverse stress factor from as far away as 25 feet; from five feet or less -- even by only a few demonstrators -- could cause a stress reaction that is extreme. Preliminary Injunction Transcript at 742-53. Her testimony is in accord with accepted "social impact" theory, *see, e.g.*, Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* 54, 62 (1975) ("[C]lose contact with strangers . . . is aversive and leads to discomfort . . . . [W]hen someone crosses a personal-space boundary, anxiety or stress often results."); Edward T. Hall, *The Hidden Dimension* 122 (1966) ("When stress increases, sensitivity to crowding rises -- people get more on edge -- so that more and more space is required as less and less is available"), and particularly as that theory relates to anti-choice activity at abortion clinics, *see* Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations*, 12 Population and Environment 379, 386 (1991) ("The strategy of antiabortion activists is to make the targets of their protests acutely uncomfortable by purposefully violating accepted cultural norms for the use of space, and to use social distances in deliberately inappropriate ways."). *See generally* Robert Sommer, *Personal Space: The Behavioral Basis of Design* 26-57 (1969); Hall, *supra*, at 107-122.



Clinical Psychology 404 (1994) (impact study of anti-abortion demonstrations conducted at plaintiff Buffalo Gyn Womenservices during summer of 1990 revealed that such demonstrations increased post-abortion depression).

Additionally, patients who are prevented or intimidated from gaining access to a clinic, or sent home because of their anxiety, delay obtaining their abortions.

> This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . . complications may result.

*Pro-Choice Network*, 799 F. Supp. at 1427.[11]

The stress caused by defendants' tactics -- and the hesitancy to enter the clinics -- is aggravated by patients' reasonable fear of violence. Patients and staff are well aware of the extreme measures abortion opponents have taken against patients seeking

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[11] *See also Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (women are often so upset by protesters that they reschedule appointments and obtain later, and therefore more dangerous, medical procedures); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989) (woman denied necessary medical services in Pennsylvania as a result of blockade), *aff'd*, 919 F.2d 857 (3d Cir. 1990).

reproductive health care and their health care providers. Since 1977 there have been more than 1,800 acts of violence towards abortion providers, staff, and patients. These include 5 murders, 12 attempted murders, 41 bombings, 106 arsons, 266 death threats, 97 assaults, 2 kidnappings, and 351 clinic invasions. National Abortion Federation, *Incidents Of Violence and Disruption Against Abortion Providers, 1995* 1 (Jan. 1996). These events are seldom isolated, local events; they are part of a campaign coordinated and planned strategically on a national level. For example, the "success" of a massive clinic assault and blockade mission headed by Operation Rescue in Wichita, Kansas in 1991, *see United States v. Cooley*, 787 F. Supp. 977, 980 (D. Kan. 1992), led it to launch similar campaigns. Only two months after the district court issued a preliminary injunction in this case, Operation Rescue conducted the massive "Spring of Life" blockade campaign in Buffalo, in which over 600 arrests were made and five defendants in the instant case pleaded guilty to criminal contempt for violating the preliminary injunction.[12] This Court must consider the national climate of fear created by anti-choice violence when analyzing the privacy interests of the patients at the clinics and the impact of harassment on those patients who come to clinics already fearing potentially deadly violence.[13]

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[12] Shortly thereafter, Petitioner Schenck conducted a nationwide "twelve-week Operation Rescue training program designed to teach leaders in the anti-abortion movement the most effective techniques to further their cause." Lynne Bumpus-Hooper, *Anti-Abortion Leader Draws 'Battle Plan,'* Orlando Sentinel Tribune, February 21, 1993, at B3. He urged anti-abortion activists, *inter alia*, to become "subversives," and to blockade and gain control of medical facilities. *Id.*

[13] Indeed, the context of fear and intimidation surrounding reproductive health care clinics is similar to other contexts where the government's interest in public health and safety justify restrictions on speech. Recognizing that context can alter the meaning of speech, *i.e.*, a "message" in one context can become a "threat" in another, the federal courts have upheld even content-based restrictions on speech in order to

(continued...)



### 3. The Patients Here Are Truly "Captive" To Petitioners' Invasive Tactics.

In addition to the substantial privacy interests at stake, as well as the severe harm caused by infringement of these interests, application of the captive audience doctrine is compelled by the degree of captivity of the patients needing to enter the medical facilities. As the district court found, these patients "cannot, as a practical matter, escape" defendants' expressive activity. *Pro-Choice Network*, 799 F. Supp. at 1436.

The court's factual findings illustrate an arsenal of extreme tactics employed by the defendants which render patients unable to avoid them. On a regular basis -- both before and after the court's initial injunction -- patients, Respondent clinics and physicians, and their staff have been confronted with harassment, intimidation, and physical abuse by the defendants. *See id.* at

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[13] (...continued)
protect public health and safety. For example, although a statute prohibiting comments or jokes about a "bomb" or "hijacking" might be unconstitutional in some contexts, the courts have upheld statutes criminalizing even offhand remarks about bombs or hijacking if made in airports or airplanes. *See United States v. Irving*, 509 F.2d 1325 (5th Cir.), *cert. denied*, 423 U.S. 931 (1975); *United States v. Omirly*, 488 F.2d 353 (4th Cir. 1973); *United States v. Rutherford*, 332 F.2d 444 (2d. Cir.), *cert. denied*, 377 U.S. 994 (1964); *United States v. Allen*, 317 F.2d 777 (2d. Cir. 1963); *Taylor v. United States*, 358 F.Supp. 384 (S.D. Fla. 1973); *United States v. Silver*, 196 F. Supp. 677 (E.D.Pa. 1961). In doing so, courts not only recognized the heightened interests in security and public safety inherent in airline travel, but also looked to the history of aviation terrorism and the consequences of terrorist threats -- whether real or pranks -- that led Congress to enact laws banning such speech. Accordingly, Petitioners' exhortation for the Court to "address the present petition independent of the national controversy out of which it arises," Brief for Petitioners at 18, is in direct conflict with constitutional jurisprudence. *See also Burson*, 504 U.S. at 200-06 (100-foot polling buffer zone was necessary to ensure the right to vote in light of this country's history of voter intimidation and election fraud).

1423-27. Defendants physically blockaded clinic entrances, often by chaining themselves together. *Id.* at 1424. They formed "constructive blockades" by congregating around the entrances and in the driveways, making loud and disruptive noises, and harassing patients and staff. *Id.* They further forced themselves upon and intimidated patients and staff by surrounding, pushing, grabbing, shoving, and yelling at them. *Id.* They also engaged in so-called "sidewalk counseling," where anti-choice "counselors" yell at, badger, and harass patients while invading their personal space. *Id.* at 1424-25. "[E]ven when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message." *Id.* at 1436.[14]

These pitched activities "force women seeking access to [the medical facilities] to run a gauntlet of demonstrators, picketers and 'sidewalk counselors.'" *Id.* They cannot avoid the throngs of protesters who complicate access to the clinic in order to deter them from receiving health care; nor can they evade the persistent badgering of "sidewalk counselors. They are crowded and pursued, their personal space is invaded, their eyes and ears are bombarded. As in *Lehman*, where they go, so goes the message.[15]

These patients cannot "simply . . . avoid speech they do not want to hear." *Frisby*, 487 U.S. at 484. "Defendants' aggressive conduct makes it impossible for women entering the clinics simply to avert their eyes or cover their ears in order to avoid

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[14] *See also Pro-Choice Network v. Walker*, 994 F.2d 990, 992 (2d Cir. 1993) (involving contempt judgments in case at bar) (one of the defendants pursued and harassed patients for an entire city block, even after repeatedly being asked to leave them alone).

[15] However, unlike the commuter in *Lehman*, or the driver in *FCC*, patients cannot escape the protesters' harassment by simply looking away or turning the channel. Thus, the degree of captivity is even greater here than in cases relying on that factor to support application of the captive audience doctrine.



receiving defendants' message." *Pro-Choice Network*, 799 F. Supp. at 1436. Unlike the drive-in movie passersby in *Erznoznik* and the courtroom visitors in *Cohen*, women targeted and pursued while seeking access to reproductive health clinics for medical care cannot avoid offensive and relentless "sidewalk counseling" by looking in a different direction; nor should they have to "stop up [their] ears."[16] *Madsen*, 114 S. Ct. at 2529; *cf. FCC; Bethel School District*. Unlike the recipients of objectionable mail in *Bolger* and *Consolidated Edison*, patients here cannot simply take the defendants' "messages" and toss them in the trash.

In sum, as this Court recognized in *Madsen*, patients seeking access to reproductive health clinics are a captive audience entitled to protection: "[T]argeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S. Ct. at 2526 (citation omitted).[17] Thus, "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the [invasiveness] of political protests." *Id.* at 2528. Ultimately, "[t]he only choice women have if they want to avoid the message is to forego their constitutional right to have an abortion." *Pro-Choice Network*, 799 F. Supp. at 1436. This

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[16] To do so would directly infringe on the patient's autonomy: "by closing off one's ears, one cannot listen to those sounds one wishes to hear." Strauss, *supra*, at 118.

It is no answer to suggest that women seeking access to the medical facilities are not a captive audience because they are exposed to objectionable speech for a limited time. *See* Brief of AFL-CIO at 27. Even brief exposure to the harassment and intimidation by defendants can adversely effect the patients' health. Thus, as this Court found in dismissing a similar argument in *FCC*, "[this] is like saying that the remedy for assault is to run away after the first blow." 438 U.S. at 748-49.

[17] *See also id.* at 2533 (Stevens, J., concurring in part, dissenting in part) (The First Amendment "does not encompass attempts to abuse an unreceptive or *captive audience*") (emphasis added).

burden is too great. Accordingly, the district court properly recognized that the state has a significant interest here in protecting a captive audience through the limited restrictions against the defendants' invasive tactics.

### B. The Injunction Protects This Captive Audience And Burdens No More Speech Than Necessary.

The narrow injunctive provisions protect women attempting to exercise their constitutional right to reproductive choice from the harms caused by aggressive and hostile abortion opponents. *See Pro-Choice Network*, 67 F.3d at 391-92 (provisions "provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators"). Moreover, they allow ample opportunity for these demonstrators to convey their message. Thus, because these provisions burden no more speech than necessary to serve an important governmental interest, they pass constitutional muster under *Madsen*. 114 S. Ct. at 2525-28.

As in *Madsen*, the buffer zone is necessary to ensure access to the clinics and to soften the blow of the myriad anti-choice confrontational tactics which "[take] their toll on the clinic's patients."[18] *Pro-Choice Network*, 67 F.3d at 388 (quoting *Madsen*, 114 S. Ct. at 2521). The buffer curtails the harassment that begins the moment the woman approaches the facility and continues even as she is leaving, and prevents the "constructive blockades" which frequently result in delayed medical care. *See Pro-Choice Network*, 799 F. Supp. at 1424. It alleviates the crowding, yelling, pushing, and grabbing which "cause[] stress and sometimes even physical injury," *id.*, and prevents the invasions of patients' personal space, *id.*, which can have significant adverse physical and psychological effects.

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[18] *See Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1329 (D. Minn. 1995) (upholding "buffer zone . . . adopted as a practical device used by the police to protect those actively exercising their rights from those who would prevent its exercise").



Although the radius of the buffer is only fifteen feet, this distance is sufficient to give patients critical personal space to avoid the most disturbing "in your face" tactics, and helps create the "atmosphere necessary for rendering safe and efficacious health care." *Id.* Yet, at the same time, the district court's "carefully drawn restriction[]," *id.* at 1434, is limited to allow ample opportunity for the speech of those seeking to stop women from receiving that care. In assessing the burden to speech in *Madsen*, this Court found significant that "the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic. . . . Protesters standing across . . . from the clinic can still be seen and heard . . . ." 114 S. Ct. at 2527. So too here, a buffer with "a very short radius [of] fifteen feet," *Pro-Choice Network*, 67 F.3d at 389, will ensure that the protesters' "message will still be conveyed." *Pro-Choice Network*, 799 F. Supp. at 1437. Defendants "can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by." *Id.*[19] *Cf. Frisby*, 487 U.S. at 483-84 (upholding restriction on focused picketing of residences which left ample alternatives for generalized communications within neighborhood).

In fact, the term "buffer zone" is a misnomer. Because the zone has such a short radius, most non-verbal means of communication, such as placards, will not be affected. Moreover, the injunction here -- unlike the one approved in *Madsen* -- allows a significant amount of verbal expression, both because of

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[19] *See also Madsen*, 114 S. Ct. at 2524 n.2 ("petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone"); *Bering v. Share*, 721 P.2d 918, 931 (Wash. 1986) (injunction's speech-free zone in front of reproductive health care clinic provides ample opportunity for speech since for anyone desirous of counseling, "it is a very short walk to the end of the block where picketers are free to 'counsel'). Obviously, Petitioners need not relocate "to a meeting hall or a town park elsewhere." See Brief of The Rutherford Institute at 11.

its radius and because counseling is permitted without geographic restriction if not rebuffed by a patient. Thus, as the Court of Appeals deemed it, "permeable buffer" better describes the restriction on speech communicated towards women inside the zone. *Pro-Choice Network*, 67 F.3d at 387.

The injunction's mandate that the permeable buffer zone float with the patient or her vehicle as they approach or leave the clinic also is necessary. Given a buffer of only fifteen feet around the clinic entrance, the district court employed a float to ensure that patients can get between their cars and the clinics without having anti-choice extremists approach them at close range unless they want it. *See Hill*, 911 P.2d at 674 (eight-foot personal zone within 100-foot radius from clinic entrance "depriv[es] protesters of the opportunity to intimidate or make other physical contact with the patients or staff"); *State v. Baumann*, 1995 Wisc. App. LEXIS 261, at *21, 532 N.W.2d 144 (Wisc. Ct. App. 1995) (injunction's "ten-foot bubble [surrounding any person entering or exiting the clinic] . . . ensures freedom of movement, free of intimidation, for those who do not wish to engage in conversation"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530, 534 (Ga. 1991) (injunction's 5- foot cease and desist bubble that extends 50 feet from clinic "affords a clinic patient, physician, or employee the ability to exit a vehicle and approach the site of medical care without being swarmed, jostled, and yelled at from close range by protestors").

Indeed, the district court's approach was quite conservative. It refused to employ a larger, non-moving buffer -- even one, as in *Madsen*, that imposes an *absolute* ban on speech -- which would have moved demonstrators even further away from their targets, despite the fact that these more restrictive zones have consistently withstood judicial scrutiny in this Court. *Cf., e.g., Madsen* (36-foot no-speech zone); *Burson* (100-foot zone around polling entrances); *Boos v. Barry*, 485 U.S. 312 (1988) (prohibition on congregating within 500 feet of foreign embassy); *Cox II* (ban on picketing near courthouse applied to prohibit protesters from coming within 100 feet of state courthouse in



Baton Rouge).[20]

*Burson* is particularly instructive because, in the face of countervailing fundamental rights and an analogous need to gain access to a physical facility in order to exercise that right, the Court upheld under strict scrutiny a content-based restriction more burdensome than the content-neutral restriction at issue here. *Burson* upheld a Tennessee statute that -- in order to combat voter intimidation and election fraud -- imposed a 100-foot buffer zone around polling entrances in which votes could not be solicited and campaign materials could not be displayed or distributed. The intimidation of women exercising their fundamental right to reproductive choice in this case is at least as compelling as the historical voter intimidation and election fraud recognized in *Burson*. In *Burson*, the Court noted that "labor men" were afraid to vote and stayed away from the polls, 504 U.S. at 201 n.7, and that agitators engaged in heated competition involving "sham battles" aimed at keeping away elderly and timid voters. *Id.* at 202. Similarly, the district court below discussed the often "charged encounters" at the clinics during which the "sidewalk counselors" invaded the women's personal space and persisted to harass, badger, intimidate and yell "even after the patients signal[ed] their desire to be left alone." *Pro-Choice Network*, 799 F. Supp. at 1425. Just as the campaign agitators in *Burson* targeted elderly and timid voters, the "sidewalk counselors" here target young women and those who occupy cars with out-of-state license plates. *Id.* The need for safe, unfettered access to medical facilities here is at least as compelling as the need for safe access to polling places. Given *Burson*'s holding that the 100-foot buffer zone met strict scrutiny, it would defy reason for

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[20] *See also, e.g., Murray v. Lawson*, 649 A.2d 1253 (N.J. 1994) (upholding injunction's 100-foot buffer around home of abortion provider), *cert. denied*, 115 S. Ct. 2264 (1995); *Baumann* (affirming twenty-five foot buffer zone around reproductive health care clinic, noting it is even less restrictive than the zone in *Madsen*); *Portland Feminist Women's Health Center*, 859 F.2d at 685-87 (affirming injunction's twenty-five foot clear zone around the entrance to reproductive health care facility).

this Court not to find that the narrower bubble zone here meets the more relaxed *Madsen* standard.

Like the buffer zone, the cease and desist provision "ensures that the injunction does not hamper Project Rescue's message, only its intimidating method of demonstration." *Pro-Choice Network*, 67 F.3d at 389. It prohibits only harmful tactics -- intimidation, harassment, the invasion of personal space, and badgering -- foisted upon a captive, unwilling audience in need of medical care. *See id.* at 391. This Court must recognize that, in the context of reproductive health clinics, persistent "counseling" in the face of a request to withdraw *is not* "peaceful." *Madsen*, 114 S. Ct. at 2529. Thus, "the 'cease and desist' provision is necessary in order to protect the right of people approaching and entering the facilities to be left alone." *Pro-Choice Network*, 799 F. Supp. at 1435. Moreover, because this provision protects patients only from unwanted communication, it allows more speech than have the restrictions in other captive audience cases:

> In this case, the "cease and desist" provision shields only unwilling listeners from defendants' message. In *Lehman* and *Kovacs*, however, both willing and unwilling listeners were prevented from hearing the speakers' message. Thus, the Court's "cease and desist" provision advances the values of the marketplace of ideas by permitting listeners to exercise their autonomy to make their own determinations among competing ideas. Once a woman seeking access to one of the clinics has made a determination not to listen to defendants' message, defendants must respect her choice.

*Pro-Choice Network*, 799 F. Supp. at 1436.



## II. The Cease And Desist Provision Also Is Constitutional Because It Is Only Triggered By The Targeted Patient Communicating Her Unwillingness To Hear Additional "Counseling."

This Court has held that a "notice remedy"-- by which a restriction on expression is triggered when a targeted recipient gives notice that further communication is not desired -- is a constitutional means of protecting one's right to be let alone. *Rowan*; *see also Martin v. Struthers*, 319 U.S. 141, 148-49 (1943) (householders have right to indicate that they are unwilling to be disturbed by door-to-door distribution of literature). "The First Amendment protects the right of a prospective recipient of [speech] to refuse the communication as well as the right of the prospective communicant to offer it." *Sabelko v. City of Phoenix*, 68 F.3d 1169, 1173 (9th Cir. 1995) (upholding cease and desist ordinance governing abortion clinics) (citing *Martin*; *Schneider v. State*, 308 U.S. 147 (1939).

In *Rowan*, this Court unanimously upheld a federal statute that allows a recipient of unwanted mail to give notice to the sender that she wishes no further mailings and requires the sender both to remove the recipient's name from its mailing lists and to stop all further mailings to that person. In upholding the statute, the Court relied on the fact that it called for a notice remedy, as well as the fact that the mailings were offensive and intrusive. The Court noted that under the statute, "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." 397 U.S. at 737. Although the statute "impede[s] the flow of even valid ideas, . . . no one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 738. *See also Consolidated Edison*, 447 U.S. at 542 n.11 (state could achieve goal of "protecting consumers against overly intrusive bill inserts . . . by requiring [company] to stop sending bill inserts to the homes of objecting customers").

The cease and desist provision operates virtually identically to the notice remedy in *Rowan*, in that a "sidewalk counselor"

need not cease communicating face-to-face until the targeted patient gives notice that she does not wish further "counseling." The provision here, however, is on even stronger constitutional footing than that in *Rowan*. While the inconvenienced householder in *Rowan* merely had to throw out unwanted mail, *see also Consolidated Edison*, 447 U.S. at 542, the patients trying to enter reproductive health care facilities have no choice, absent an injunction, but to listen to persistent anti-choice badgering and harassment. Moreover, as a result of the anti-choice "counselor's" unwillingness to take "no" for an answer, the potential physical and psychological harm caused by his communication is more severe than that of the merely offensive unwanted advertisements in *Rowan*. *See Pro-Choice Network*, 799 F. Supp. at 1424-26.

Unlike the cease and desist provision here, the "no approach" provision that the Supreme Court invalidated in *Madsen* did not contain a notice remedy. Rather, that provision barred demonstrators from "proffer[ing] their advice at an intimate range unless the counselees 'indicate[d] a desire to communicate by approaching or by inquiring of the [counselors].'" *Pro-Choice Network*, 67 F.3d at 390 (quoting *Madsen*, 114 S. Ct. at 2522). Thus, the *Madsen* remedy, which disallowed speech unless the prospective listener invites it, is very different than the remedy here, where speech is allowed until the listener says "stop." As the Court of Appeals in this case and the Ninth Circuit Court of Appeals have found, this distinction is dispositive. *Pro-Choice Network*, 67 F.3d at 390; *Sabelko v. City of Phoenix*, 68 F.3d at 1173.

The cease and desist provision is consistent with the proposition that the First Amendment protects the right of every citizen to "reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *see also* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U. L. Rev. 153, 193 (1972) (a "notice remedy" "preserv[es] for those wishing to speak an opportunity to get at least 'one shot' at all potential audiences"). Like the statute in *Rowan*, but unlike the "no approach" provision in *Madsen*, the cease and desist provision



does not prevent "sidewalk counselors" from reaching willing listeners. *Cf. FCC*, 438 U.S. at 766 (Brennan, J., dissenting) (distinguishing *FCC* on this basis because the FCC ban prohibited willing listeners form hearing the broadcast); *Lehman* (curtailing speech even to willing viewers).[21] Because the notice remedy is invoked only when the listener indicates that no further communication is desired, this tips the "scales" in favor of "the right of every person to be let alone." *Rowan*, 397 U.S. at 736; *see Madsen*, 114 S. Ct. at 2533 (Stevens, J., concurring in part, dissenting in part) (although the speaker has the "*right to offer* 'sidewalk counseling'," this right "does not encompass attempts to abuse an unreceptive or captive audience") (emphasis added).

## III. Injunctions Have Consistently Been Granted In Other Contexts Where The Right Of The Listener To Be Left Alone Outweighs The Interests Of The Speaker.

The correctness of the Court of Appeals' decision becomes even more apparent when it is viewed in light of other areas of law where courts have adopted context-sensitive First Amendment analyses and allowed listener-protective relief to prevent unique harms. Of especial relevance are decisions rejecting First Amendment challenges to comparable restrictions in the domestic violence and sexual harassment contexts.

Orders of protection -- like the injunctive provisions at issue -- restrict speech based, in part, on injury and harm to the recipient. Cognizant of this harm, courts have consistently rejected First Amendment challenges to orders of protection and domestic violence statutes. *See* Catherine F. Klein & Leslye E.

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[21] Petitioners' use of *Jones v. City of Opelika*, 316 U.S. 584 (1942) (Stone, C.J., dissenting), *adopted on rehearing as opinion of Court*, 319 U.S. 103 (1943) (per curiam), is inapposite. *See* Brief for Petitioners at 37. That case dealt with a publisher who, no matter whether he "withheld" or "withdrew" the privilege to publish, prevented the audience from receiving the restricted message. In the instant case, it is the audience itself -- the patient -- who decides. Thus, the fact that she first hears the message is meaningful.

Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 905, 907 (1993). For example, in *Schramek v. Bohren*, 429 N.W.2d 501 (Wis. Ct. App. 1988), the Wisconsin Court of Appeals rejected a First Amendment challenge raised by a woman who had been ordered, pursuant to the state spousal abuse statute, to stay away from her husband's residence, to avoid contacting her husband unless he consented in writing, and to arrange visitation with their child through a third party. *Schramek*, 429 N.W.2d at 503.[22] The court noted that the statute was "not directed at free speech but at the suppression of physical abuse or the threat thereof," and that "[e]ven if the sanctions of the statute indirectly prohibit speech, the state can ban speech directed primarily at those who are unwilling to receive it." *Id.* at 506 (citing *Frisby*, 108 S. Ct. at 2504).

Similarly, in *State v. Hauge*, 547 N.W.2d 173 (S.D. 1996), the South Dakota Supreme Court responded to a campaign of physical and verbal abuse of the defendant against his ex-wife by issuing a protective order directing defendant to "not verbally contact Plaintiff in any manner, which includes phone contact or contact through third parties, and . . . not verbally abuse or threaten Plaintiff." *Id.* at 174. In rejecting a First Amendment challenge, the court held that the protective order satisfied the

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[22] The plaintiff in *Schramek* challenged the state spousal abuse statute itself rather than the protective order. Domestic violence and spousal abuse statutes are directly analogous to the injunctive provisions here because those statutes specifically authorize broad injunctive relief based on "reasonable grounds" that an individual already has or might in the future engage in domestic abuse. *See, e.g.*, Wis. Stat. § 813.12 (1994), *cited in Schramek*, 429 N.W.2d at 504; Klein & Orloff, *supra*, at 901 ("Most state statutes recognize the relevance of a past abusive act to provide a context to evaluate present fear and danger."). Moreover, the proposition that "there must be a long history of repeated wrongful or threatening behavior of a specific defendant against a specific plaintiff" in order to justify a buffer zone, Brief of Family Research Council at 12 n.7, if true, precisely describes the conduct of the defendants towards the health care providers and their patients in this case.



*Madsen* standard for injunctions. The court found that the interests in preserving residential privacy and "the mental and emotional health of the vulnerable" were compelling, and that "[t]o shield victims of domestic violence from threats and intimidation, court must sometimes prohibit all contact between the abused and the abuser." *Id.* at 176. *See also Gilbert v. State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) (upholding state Protection from Domestic Abuse Act and "reject[ing] any notion that the First Amendment . . . ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse");[23] *People v. Blackwood*, 476 N.E.2d 742 (Ill. App. Ct. 1985).

The reasonable apprehension of violence and both physical and psychological harm, particularly in light of past misconduct, is common to both the clinic disruption and domestic violence contexts. As with domestic violence, "sidewalk counseling" and focused picketing by the defendants involves communications that frequently are threatening or abusive. And like survivors of domestic abuse, the women trying to obtain medical care here suffer the same reasonable apprehension of serious harm. This is reflected in the abusive practices previously employed by the defendants, and is exacerbated by the extensive history and escalating level of violence associated with anti-choice protests. Thus, just as domestic violence statutes authorize injunctive relief based on reasonable grounds of past or likely violent conduct in order to safeguard the victims of such violence, the injunction here provides patients with a means of getting into and out of a clinic without risking severe physical and psychological hardship.[24]

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[23] The husband in *Gilbert* was ordered, among other things, "not to visit with . . . or otherwise interfere with his wife . . . and to remain away from her residence." 765 P.2d at 1209.

[24] These provisions are far less restrictive of expression than the "stay away" orders and other broad restrictions in *Hauge*, *Schramek* and

(continued...)

Sexual harassment provides another analogous context. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1996), prohibits conduct and speech which constitute "quid pro quo" harassment or which create a "hostile environment." *See Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993). In *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), the court enjoined sexually harassing speech that created a hostile environment, specifically rejecting a First Amendment challenge to the hostile environment sexual harassment doctrine.[25] The court reasoned that an injunction could restrict the speech at issue because, *inter alia*, the interest in eliminating discrimination in the workplace justified the infringement on speech, that the female workers were a captive audience,[26] and that the

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[24] (...continued)
*Gilbert*. Rather than imposing a blanket prohibition of a wide range of conduct with no geographic limit, the buffer zone and cease and desist provisions only restrict demonstrating within a fifteen foot radius of the clinic or woman, and only restrict "sidewalk counseling" within this radius after a targeted woman communicates her unwillingness to be "counseled."

[25] The plaintiff alleged hostile environment sexual harassment based on the prominent posting of pictures of nude women throughout the workplace and the constant barrage of insulting and derogatory comments she received form male co-workers. *Id.* at 1494-99. The court enjoined the defendant company from maintaining the hostile environment. *Id.* at 1541. Prohibited conduct included sexual comments made in the presence of an employee who had indicated that such conduct was unwelcome. *Id.* at 1542.

[26] "[W]omen employees . . . may be forced to endure unwanted messages by virtue of being unable to leave the workplace. If a woman really wants to avoid the offensive speech, she may be forced to leave her job." Marcy Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L. Rev. 1, 13 (1990). *See also NLRB v. United Steelworkers*, 357 U.S. 357, 368 (1958) (Warren, J., concurring in part, dissenting in part) ("[e]mployees during working hours are the classic captive audience"); *Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383, 401-02 (continued...)



injunction was narrowly tailored to remedy this discrimination. *Id.* at 1535-36. Other courts have similarly concluded that the First Amendment does not protect hostile environment sexual harassment liability under Title VII. *See, e.g., Jew v. University of Iowa*, 749 F. Supp. 946, 961 (S.D. Iowa 1990); *Jordan v. Wilson*, 662 F. Supp. 528, 533-34 (M.D. Ala. 1987); *Doe v. University of Mich.*, 721 F. Supp. 852, 862-63 (E.D. Mich. 1989); *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599, 610 (S.D.N.Y. 1981).

Recognizing the serious harm that results from "[r]equir[ing] a man or woman [to] run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), this Court has signalled that the First Amendment does not prohibit remedies that restrict sexually harassing speech in the confines of the workplace. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 389-90 (1992). For similar reasons, the First Amendment does not prohibit the narrowly drawn injunction issued here, which ensures that women needing reproductive health care can avoid "a gauntlet of harassment and intimidation"[27] in order to exercise their constitutionally protected right to choice.

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[26] (...continued)
(E.D. Pa. 1980) (workers at jobsite were captive to harassing messages delivered over loudspeakers; only way to avoid speech was to quit jobs).

[27] *Pro-Choice Network*, 799 F. Supp. at 1424.

## CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the decision of the *en banc* Court of Appeals.

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# APPENDIX

## INTEREST OF AMICI CURIAE

**The American Medical Women's Association** ("AMWA"), founded in 1915, is a non-profit organization of 12,000 women physicians and medical students. AMWA unequivocally supports the right of the pregnant patient, in consultation with her physician, to make a personal, medically-informed decision whether or not to continue a pregnancy.

**The American Public Health Association** ("APHA"), founded in 1872, and with a membership of 55,000, is the oldest and largest multi-disciplinary society of public health professionals in the world. Throughout its history, the APHA has been in the forefront of countless efforts to protect and promote personal and public health. The APHA's membership includes physicians, nurses, social workers, behavioral scientists, bioethicists and maternal and child health specialists who are experts in both prenatal care, neonatology, women's health issues and drug abuse prevention and treatment.

**Catholics for a Free Choice** ("CFFC"), founded in 1973, shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the moral capacity of women and men to make sound and responsible decisions about their lives. Through discourse, education, and advocacy, CFFC works in the United States and internationally to infuse these values into public policy, community life, feminist analysis, and catholic social thinking and teaching. CFFC has offices in Washington, DC, Mexico City, Mexico, Montevideo, Uruguay and Sao Paolo, Brazil. Individuals in forty US states operate as affiliated independent activists.

**Connecticut Women's Education And Legal Fund, Inc.** is a non-profit women's rights organization incorporated in 1973, with over 1,400 members. Its mission is to work through legal and public policy strategies and community education

to end sex discrimination and to empower all women to be full and equal participants in society. The Connecticut Women's Education and Legal Fund, Inc. seeks to join this brief as *amicus curiae* because it is committed to protecting women's reproductive rights and because it believes in the underlying premise that unwelcome behavior can trigger restrictions on a person's right to free expression.

**Family Planning Advocates Of New York State, Inc. ("FPA")** is the only statewide voluntary organization in New York dedicated to promoting access to the full range of quality, confidential reproductive health services for all women, regardless of age, income, geographical location or other circumstances. Its members include more than 140 organizations spanning a wide range of health, welfare and religious groups, including a substantial number of abortion providers, in addition to thousands of individual members. FPA believes that every woman in New York has a fundamental right, under the federal and New York State Constitutions, to privacy in determining whether or not to bear a child and that access to providers of abortion services is an integral component of this right.

**Jewish Women International** is an organization of 75,000 Jewish women in the United States and Canada. Among its aims is to help women in improving the quality of life for themselves, their families, and society. In line with this goal, Jewish Women International has worked for more than 20 years to assure a woman's right to choose in matters of reproductive rights. Jewish Women International believes that abortion clinic violence is pointless, destructive behavior, and it has pressed for stiff penalties to be imposed on perpetrators of these crimes.

**Lambda Legal Defense and Education Fund ("Lambda")** is a national public interest law organization that advocates for the rights of lesbians, gay men, and those with HIV/AIDS through impact litigation and education. The constitutional questions implicated in the struggle of women to control



their bodies are similar to those faced by lesbians and gay men who have a deep interest in the right of individuals to engage in intimate association without government interference. Lambda is specifically interested in the issue raised by this case because the right to be free from harassment and violence is of importance to lesbians and gay men, who have themselves been targets of such campaigns; at the same time, Lambda has a vital interest in assuring that, while curbing violence, the law protects legitimate protest. Lambda represents a community with a deep need and respect for the First Amendment, inasmuch as the full civil rights of lesbians and gay men have not yet been recognized. Lambda is keenly interested in striking the appropriate balance between permitting expression and curbing violence.

**The National Center for Lesbian Rights ("NCLR")**, formerly the Lesbian Rights Project, is a non-profit public interest law firm, founded in 1977, and devoted to the legal concerns of women who encounter discrimination on the basis of their sexual orientation. NCLR is particularly well-suited to offer *amicus* assistance to this court in this matter, as NCLR attorneys regularly litigate the constitutional issues implicated here. Specifically, NCLR is concerned about the right to be free from harassing conduct and expression, as well as the right to reproductive choice. NCLR has participated in several reproductive rights cases.

**The National Organization for Women ("Now")** is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 600 chapters in all 50 states and the District of Columbia. NOW has, since its inception, worked for reproductive freedom for all women. In addition to bringing the cases *National Organization for Women v. Scheidler*, 114 S. Ct. 798 (1994), and *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), it is also the plaintiff in several cases with existing injunctions similar to the ones at issue here, including *New York State Nat'l Org. for Women v. Terry*, 41 F.3d 794 (2d Cir. 1994), and *Nat'l Org. for Women v.*

*Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994).

**The Northwest Women's Law Center**, based in Seattle, Washington, is a non-profit public interest legal organization that works to advance the legal rights of women through litigation, education, legislative advocacy and the provision of a free information and referral phone service for women with legal problems. Since its founding in 1978, the Law Center has been dedicated to representing the interests and rights of women seeking abortions. The Law Center has a long history of litigation and participation as *amicus curiae* in cases locally and throughout the country on behalf of women seeking safe and legal abortions. The Law Center has also been instrumental in the passage of legislation that provides safe access to abortion services.

**The Women's Law Center of Maryland** is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. The Women's Law Center has worked to protect reproductive rights for all women, including participation as *amicus curiae* in cases dealing with the issue. The Women's Law Center believes that the issues involved in this case are critical to the legal rights of women.

**The Women's Law Project** is a nonprofit feminist law firm based in Philadelphia, Pennsylvania devoted to winning equality and justice for women. A primary focus of the Law Project's mission is to secure reproductive freedom for all women. Since it's founding in 1974, the Law Project has challenged generations of restrictive abortion statutes on behalf of women's health care providers and the patients they serve. The Law Project served as co-counsel for plaintiffs in *ACOG v. Thornburgh*, *Planned Parenthood v. Casey*, *Elizabeth Blackwell Health Center v. Knoll*, challenging the provisions of the Pennsylvania Abortion Control Act. The Law Project devotes substantial resources toward defending



medical providers from anti-choice violence, harassment and intimidation. In *Roe v. Operation Rescue*, the Law Project won a federal injunction that continues to protect women's health care providers in southeastern Pennsylvania from mass blockades and other concerted acts of interference with patients and clinic staff. Since the tragic slayings of clinic workers in Massachusetts in December 1994, Law Project attorneys have redoubled their advocacy efforts with federal and local law enforcement officials to protect reproductive health care providers and to enforce the criminal laws vigorously against anti-choice offenders.

**The YWCA of the U.S.A.** was founded in 1858 and is one of the oldest women's organization in the country. Its mission is the empowerment of women and girls and the elimination of racism. It serves 1,004,000 women and their families through 374 community and student YWCAs at 4,000 sites. The YWCA of the U.S.A. is a member of the World YWCA. The YWCA supports the right of a woman to make her own decisions related to her reproductive health. The YWCA also supports measures that will assure the protection of persons from violence.

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No. 95-1065

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1995

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REV. PAUL SCHENCK and
DWIGHT SAUNDERS,

*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, et al.

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF OF FEMINIST MAJORITY FOUNDATION, et al., AMICI CURIAE IN SUPPORT OF RESPONDENTS

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CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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## INTERESTS OF AMICUS CURIAE

The Feminist Majority Foundation ("Foundation") is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights, and safe access to abortion and birth control. The Foundation actively pursues legal protection for reproductive health services, and provided legal counsel for Respondent Women's Health Center in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994).

The Foundation runs the largest clinic defense project in the nation, and has been active in defending the clinics in western New York that are the subject of this appeal. Since 1989, the Foundation's National Clinic Access Project has mobilized and trained more than 40,000 volunteers in more than 40 cities in 22 states to assist clinics targeted by anti-abortion groups. As part of this Project, the Foundation coordinated the response to major blockades that were part of the pattern of illegal obstructions addressed by the injunction at issue in this case. In this capacity, staff, volunteers, and supporters of the Foundation witnessed first-hand the violence directed against clinics in Buffalo, the clinic workers, and the women who seek the clinics' services.

## SUMMARY OF ARGUMENT

Most of the legal issues posed by Petitioners in this appeal have been explicitly resolved by this Court in its *Madsen* decision. In particular, *Madsen* resolved any lingering doubt that the First Amendment and the prior

restraint doctrine permit the sort of injunction issued in this case. *Madsen* held unequivocally that an injunction is not a content-based regulation of speech merely because the injunction is directed against a particular group whose members persistently obstruct access to abortion clinics, or repeatedly harass clinic patients and staff.

Thus, under the appropriate *Madsen* standard, the only questions in this case are (1) whether the injunction is supported by one or more significant interests, and (2) whether the injunction burdens more speech than is necessary to serve that interest. Both of these questions must be answered in favor of the injunction.

The interests supporting the injunction in this case are identical to the interests recognized as significant by this Court in its *Madsen* opinion. In this case, as in *Madsen*, the injunction serves to protect women's access to lawful and necessary medical care, promotes public safety and order, ensures the unobstructed ingress to and egress from clinics, protects private property rights, and protects the medical privacy of patients at the clinics. The facts regarding the obstruction and harassment of clinics, clinic staff, and patients in western New York are indistinguishable in kind or degree from the facts that this Court recognized in support of the injunction in *Madsen*. Additionally, Amicus Feminist Majority Foundation has assembled a large body of empirical evidence from a comprehensive survey of clinics around the country indicating the importance of injunctions such as the one in this case in preventing the persistent violence directed at clinics by anti-abortion activists.

The injunction provisions challenged by Petitioners also easily satisfy the *Madsen* requirement that they burden no more speech than necessary to accomplish these interests. The 15-foot buffer zone this injunction creates around clinic entrances and driveways is necessary to preserve access to the clinics, and is actually more protective of speech than the injunction upheld by this Court in *Madsen*, which created a 36-foot buffer zone that forced protesters to move across the street from the clinic. Likewise, the provision of the present injunction that creates a 15-foot buffer zone around individuals approaching or leaving a clinic, and which requires protesters to cease and desist "counseling" persons who express a desire to be left alone, is necessary to prevent the systematic harassment and coercion of patients that the District Court found to exist before the injunction was issued, and also to protect medical safety and privacy.



## ARGUMENT

### I. *MADSEN V. WOMEN'S HEALTH CENTER* PROVIDES THE PROPER STANDARD IN THIS CASE

In *Madsen v. Women's Health Center*, this Court articulated the First Amendment standard applicable to content-neutral injunctions that affect speech and expressive actions. In such cases, the Court held that the traditional time, place, and manner test must be replaced by a "somewhat more stringent application of general First Amendment principles." *Madsen*, 114 S.Ct. at 2524. Under the revised *Madsen* standard, "We must ask . . . whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest." *Madsen*, 114 S.Ct. at 2525.

Petitioners argue that the injunction in this case should be judged under a strict prior restraint standard

rather than what they characterize as the "exceptional" *Madsen* standard. *See* Pet. Br. at 23.[1] Indeed, Petitioners contend that the application of the *Madsen* standard is essentially limited to the "highly unusual factual circumstances at the abortion facility in Melbourne, Florida." Pet. Br. at 26.

This argument directly contradicts explicit statements in the *Madsen* opinion itself. In *Madsen*, the Court specifically considered and rejected a prior restraint analysis for reasons that are directly applicable to the injunction in this case. *See Madsen*, 114 S.Ct. at 2524 n.2. In *Madsen*, as in this case, the protesters potentially affected by the trial court's order could express their opinions in many different ways, so long as they did not do so within the narrow buffer zone defined by the injunction. *Id.* Likewise, in *Madsen*, as here, the injunction was not issued because of the content of Petitioners speech, but rather because of the Petitioners' obstructive conduct. *Id.* Thus, as the Court concluded in *Madsen*, "[n]ot all injunctions which may incidentally affect expression . . . are 'prior restraints'." *Id.* As discussed in the next section of this brief, there are no significant differences between the type or magnitude of conduct in this case and the conduct in *Madsen*.

Therefore, *Madsen* provides the proper standard for assessing whether the injunction in this case passes muster under the First Amendment. Accordingly, the first question in this case is whether the injunction issued by the District Court served a significant governmental interest, and the second question is whether the injunction

1. Petitioners' Brief will be referred to as "Pet. Br." throughout this brief.



burdened no more speech than necessary to serve that interest.

## II. THE RESPONDENTS' INTERESTS IN AVOIDING VIOLENCE, HARASSMENT, AND OBSTRUCTION OF THEIR FACILITIES ARE IDENTICAL TO THE INTERESTS SUPPORTING THE INJUNCTION UPHELD BY THIS COURT IN *MADSEN*

In their response to the Second Circuit's opinion in this case, the Petitioners inaccurately minimize the facts relating to attacks on clinics in western New York that led to the imposition of the injunction by the District Court. Petitioners also misstate the scope and application of the *Madsen* holding. Petitioners argue that the Second Circuit's *in banc* opinion in this case neglected "two crucial factors in the *Madsen* analysis: first, the need for initial resort to a narrower, nonspeech-restrictive injunction before imposing broader restrictions; and second, the need for a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure." Pet. Br. at 27. Even if this narrow phrasing accurately reflects the *Madsen* holding, the facts in this case easily satisfy the standard.

In this case, the District Court's preliminary injunction was preceded by two years of blockades and other attacks on clinics in the Buffalo area. Also, before entering the preliminary injunction challenged in this case, the District Court *did* resort initially to a narrower order in the form of a Temporary Restraining Order. Unlike the preliminary injunction, the TRO did not contain provisions imposing 15-foot buffer zones around clinic entrances, driveways, parking lots, or vehicles coming to

or leaving from clinics. *Compare Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 382 n.1 (2d Cir. 1995)(quoting relevant portion of TRO) *with id.* at 393 (quoting relevant portion of preliminary injunction). Multiple violations of the District Court's TRO would certainly constitute "a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure." *See Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1423 (1992)(detailing contempt motions brought against various protesters for violating District Court's TRO). Thus, the facts in this case satisfy even the Petitioners' narrow articulation of the *Madsen* standard.

Putting aside the strong evidence in this case, Petitioners' characterization of the *Madsen* factors is flawed. With regard to the first factor cited by Petitioners, nothing in the *Madsen* decision requires a trial court confronting ongoing obstructions of medical facilities to issue an ineffective injunction before it can issue an effective one. The fact that a prior injunction in *Madsen* failed to solve the problems posed by obstructive protests outside the Melbourne clinic was relevant to the First Amendment analysis only because the facts surrounding the violations of the prior injunction contributed to the trial court's determination that "allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option." *Madsen*, 114 S.Ct. at 2527. Certainly, as this Court noted in *Madsen*, the failure of a previous injunction "may be taken into consideration in evaluating the constitutionality of the broader order," *id.*, but such an order (if it exists) is simply part of



the entire factual context that any trial court facing similar circumstances must face. Facts other than the violation of a previous injunction can also contribute to a trial court's conclusions about the viability of effective injunction provisions, as they obviously did in the present case.

This Court's discussion of the factual predicates to the *Madsen* injunction indicates that even if there had been no prior injunction in *Madsen*, the facts of that case would justify injunction provisions such as the buffer zone surrounding the clinic. The conduct identified by the trial court in *Madsen*, such as the blocking of ingress to and egress from buildings and the harassment of patients going to and from clinics, would in themselves satisfy the significant state interest requirement of the *Madsen* standard. Cases of this sort are always highly fact-specific, and as the Court pointed out in *Madsen*, "some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, 114 S.Ct. at 2527.

The second "crucial factor" cited by Petitioners as part of the *Madsen* standard also pertains to the issue of whether the injunction is supported by a significant governmental interest. In this respect, Petitioners' assertion of "the need for a showing of pervasive lawbreaking," Pet. Br. at 27, fails to acknowledge the breadth of interests that a trial court may consider in cases such as these. While outright "lawbreaking" may be one legitimate target of a content-neutral injunction, an injunction may also regulate otherwise lawful activity if that activity occurs in an inappropriate setting, at inappropriate times, or in a manner that makes other lawful conduct impossible. The notion that lawful activities may be regulated in this

way is not a novel concept. Similar considerations have long been a part of First Amendment time, place, and manner jurisprudence. In those cases, as here, "[t]he crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

A recognition of the judicial responsibility to balance competing interests is at the core of the *Madsen* decision. In *Madsen*, this Court held that five significant interests were served by the provisions of the injunction upheld in that case. Drawing on the factual findings of the lower courts, this Court noted that the *Madsen* injunction protected "a woman's freedom to seek lawful medical or counseling services in conjunction with her pregnancy," *Madsen*, 114 S.Ct. at 2526, ensured "the public safety and order," *id.*, promoted "the free flow of traffic on public streets and sidewalks," *id.*, protected private property rights, *id.*, and protected "medical privacy," *id.*, an interest akin to the residential privacy interest acknowledged in previous cases such as *Frisby v. Schultz*, 487 U.S. 474 (1988). According to this Court, "the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." *Madsen*, 114 S.Ct. at 2526.

Petitioners attempt to distinguish this case from *Madsen* by arguing that the *Madsen* holding depended on "rather extraordinary factual circumstances." However, the background to the protests in Buffalo indicates that the circumstances of this case presented to the District Court precisely the same "extraordinary factual circumstances" found in *Madsen*. As in *Madsen*, the trial judge in this case concluded that this injunction provided the narrowest



effective response to an ongoing pattern of aggressive and intentionally obstructive behavior directed at the clinics in Buffalo.

A review of the District Court's opinion in this case reveals findings very similar in nature to those supporting the *Madsen* injunction. With regard to the interest in protecting access to clinics, the District Court found that Respondent clinics have "on numerous occasions" been victims of blockades, during which "demonstrators trespass on the clinic property and sit or lay in the entrances of the clinic in an attempt to block access to and egress from the clinic." *Pro-Choice Network*, 799 F.Supp. at 1424. These tactics often achieved their objective, as the District Court found that "[o]n many of those occasions, the operation of the targeted facility was effectively stopped or significantly hampered." *Id.* The District Court found that demonstrators also constructively blockaded the clinics by "frequently and routinely congregat[ing] in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities." *Id.* According to the evidence introduced in the District Court, this behavior had caused "stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupt[ed] the atmosphere necessary for rendering safe and efficacious health care." *Id.*

With regard to the interest in preserving public safety and order, the District Court found that "[m]any of the 'sidewalk counselors' and other defendants have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." *Id.* at 1425. With regard to the traffic control interest, the District Court found that the

demonstrators' activities "intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger both to the occupants of the cars and the demonstrators themselves." *Id.* at 1424. Finally, with regard to the interest in preserving medical privacy, the District Court found that "sidewalk counselors" frequently used video cameras "as offensive weapons to harass and intimidate patients," who "are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion." *Id.* at 1426.[2] Unfortunately, the ugly scenario that generated the *Madsen* case is not at all "extraordinary"; it was quite accurately replicated in Buffalo.

2. Petitioners' incorrectly assert that "[a] clear majority of the *in banc* Second Circuit forthrightly agreed that this case does not present the record of lawlessness that this Court faced in *Madsen*." Pet. Br. at 45. Petitioners cite Judge Winter's concurring opinion and Judge Meskill's dissenting opinion as support for this statement. *Id.* However, Petitioners fail to cite the clear statement in the Second Circuit's majority opinion--which was joined by nine of the fifteen judges hearing the *in banc* appeal--that "We are not convinced by the dissent's recitation of distinctions between the record in the instant case and in *Madsen*." *Pro-Choice Network of Western New York*, 67 F.3d at 388. Petitioners also fail to note the Second Circuit majority's finding that the injunction was supported by an "extensive record documenting Project Rescue's harassment and intimidation of patients, and documenting the effects produced by such harassment." *Id.* at 389. The District Court's findings cited in the text accompanying this footnote indicates that the District Court was faced with precisely the same types of conduct that the state trial court faced in *Madsen*.



## III. THE "SPRING OF LIFE" DEMONSTRATIONS OF 1992 REINFORCE THE DISTRICT COURT'S FINDINGS CONCERNING THE THREATS TO CLINICS IN BUFFALO

The facts cited by the District Court to justify issuing the injunction were not isolated incidents. Rather, these incidents were part of a longstanding pattern of attacks on clinics in Buffalo and western New York. For example, as the District Court found, there was extensive evidence that clinics were subject to blockades on numerous occasions prior to the issuance of the injunction. *Pro-Choice Network*, 799 F.Supp. at 1424. Also, clinic patients and staff were routinely harassed and intimidated. *Id.* at 1424-25. Another manifestation of this pattern of attacks was the so-called "Spring of Life" protests, which commenced in April, 1992. Although the Court of Appeals did not consider the facts surrounding the "Spring of Life" demonstrations, *see Pro-Choice Network*, 67 F.3d at 386 n.3, Amicus Feminist Majority Foundation believes that these demonstrations further illustrate the atmosphere of violence and intimidation that led the District Court to grant the preliminary injunction. The "Spring of Life" demonstrations were part of the larger, systematic attack on the provision of reproductive health care in Buffalo, which provided the impetus for the injunction challenged in this case. Thus, the incidents in the "Spring of Life" demonstrations are relevant to the Court's consideration of these issues.

The "Spring of Life" campaign was an outgrowth of a concentrated series of blockades directed at clinics in Wichita, Kansas during the summer of 1991. The Wichita campaign lasted 46 days and led to 2,600 arrests.

*See* Catherine S. Manegold, *Protesters Set for Collision on Abortion*, N.Y. Times, April 20, 1992, at B1. The organizers of the Wichita protests next targeted Buffalo and the surrounding western New York area, calling for a two-week series of protests to begin on April 20, 1992. *Id.* Amicus Feminist Majority Foundation's National Clinic Access Project coordinated the response to these planned protests in the Buffalo area, to prevent a repeat of the Wichita experience. Starting eight weeks before the "Spring of Life" action began, six organizers from the Foundation began working with clinic directors, law enforcement, and pro-choice groups to recruit and train volunteers to counteract threatened blockades. The organizers also worked with local attorneys on legal strategies to counteract the protests. The injunction at issue in this case was the single most significant component of the legal response to the protests.

Blockades held in conjunction with the "Spring of Life" demonstrations attracted hundreds of anti-abortion protesters. *See id.* These blockades occasionally turned violent, and police arrested 597 demonstrators during the period from April 20-May 2, 1992. Michael Beebe, *Arrests Profiled*, The Buffalo News, May 27, 1992, at B1. On several occasions, organizers of the "Spring of Life" blocked access to clinics by having large numbers of protesters sit down in public streets. Police were forced to arrest almost 200 protesters for engaging in this tactic outside Respondent Dr. Shalom Press's clinic. According to one press account of this incident, "As police moved protesters to a nearby school bus, other pro-life supporters took their place in the road. By noon, police had filled six buses and were taking protesters to a temporary police station." Tom Ernst & Phil Fairbanks, *Police Arrest Pro-*



*Lifers at Amherst Site*, The Buffalo News, April 22, 1992, at A1. Respondent Buffalo GYN Womenservices encountered similar tactics when a large group of protesters sat down in the clinic driveway to block vehicular access to the clinic. This incident led to 71 arrests. Gene Warner, Juan Forero & Phil Fairbanks, *71 Pro-Lifers Arrested at City Clinic*, The Buffalo News, April 24, 1992, at A1. At yet a third location, protesters blocked traffic in front of a doctor's office before retreating in the face of police warnings. Gene Warner, Jane Kwiatkowski & Michael Beebe, *Abortion Protesters Block Linwood*, The Buffalo News, April 27, 1992, at C1.

In addition to blocking roads and clinic entrances, "Spring of Life" protesters actually stormed the premises at Buffalo GYN Womenservices in an apparent effort to shut down the provision of medical services altogether. Jane Kwiatkowski & Michael Levy, *71 Arrested In Purported End to Protests: Attempt to Rush Clinic Results in Most Seizures*, The Buffalo News, May 3, 1992, at B1. In this incident, as in many others, the protesters' actions were highly organized and well-coordinated--so much so that the protesters often would outflank the police. When the protesters stormed the Womenservices clinic, for example, the initial police presence was insufficient to protect the clinic, and additional forces had to be ordered in as reinforcements. *Id.* A similar attack took place outside a 13-story medical complex, which contained a clinic on its fifth floor, among many other types of medical offices. Dan Herbeck, Jane Kwiatkowski & Michael Beebe, *5 Leaders of Protest Face Arrest*, The Buffalo News, April 28, 1992, at A1. At this blockade, protesters physically attacked clinic supporters, climbed over snow-fences

erected to prevent trespassing, and crossed police lines in an attempt to shut down the clinic. *Id.* at A4.

These incidents, like the blockades that occurred prior to the issuance of the preliminary injunction, demonstrate that the behavior of anti-abortion protesters in Buffalo was far removed from the "silent witness[ing], . . . polite offers of information, . . . urgent entreaties, . . . pointed criticisms, [and] emotional exclamations" described by Petitioners. Pet. Br. at 24. The behavior here was also far worse than "some picketers and counselors . . . occasionally fail[ing] to say just the right thing in just the right way." Pet. Br. at 21. If the evidence before the District Court had reflected nothing more than the forceful but benign expression of opinion, then the injunction would be subject to challenge on First Amendment grounds. In this case, however, the District Court had abundant evidence that protesters had crossed the line from legitimate speech and were engaged in large-scale intimidation, harassment, and obstruction of clinic personnel and clinic patients. The injunction in this case thus was an indispensable and constitutional response to attacks on Buffalo-area clinics, in light of the longstanding rule that "[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). *See also Cameron v. Johnson*, 390 U.S. 611, 615-17 (1968)(rejecting First Amendment challenge to law prohibiting obstruction of courthouse).



## IV. EMPIRICAL RESEARCH CONCERNING CLINIC VIOLENCE NATIONWIDE SUPPORTS THE DISTRICT COURT'S ISSUANCE OF THE INJUNCTION IN THIS CASE

For the last three years, Amicus Feminist Majority Foundation has conducted a comprehensive survey of violence directed at clinics nationwide.[3] The results of these surveys provide substantial empirical support to the conclusions of the District Court in this case. The information discussed in this section is not intended to suggest that courts may issue injunctions based on generalized national findings. Rather, the survey results provide support for the efficacy and necessity of the District Court's response to a problem that has also been encountered in other jurisdictions. The survey results also indicate that trial courts remain reluctant to issue injunctions protecting clinics in the absence of substantial evidence of the sort that was introduced in the District Court in this case.

Four specific conclusions can be drawn from these surveys that are relevant to this case: First, the surveys

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3. The survey results discussed in this section of the Foundation Amicus brief are drawn from this 1995 Report. Feminist Majority Foundation, 1995 Clinic Violence Survey Report. The 1995 survey was mailed to 902 clinics in the United States and American Samoa in September, 1995, and follow-up calls were made in September and October, 1995. Surveys were completed by 310 clinics. "Data were analyzed using SPSS-X (Statistical Package for the Social Sciences) uni-variate and bi-variate statistical techniques." *Id.* at 1.

indicate that violence and threats of violence continue to plague reproductive health clinics throughout the country. Second, the violence and threats reported by clinics significantly impacts the effectiveness of clinic operations, especially by making it difficult for clinics to hire and retain staff. Third, violence against clinics can be substantially reduced through effective law enforcement action, including the enforcement of protective injunctions. Fourth, injunctions of the sort issued in this case are not routinely granted. Although many clinics have obtained protective injunctions, most clinics that sought such injunctions during the last year were denied relief.

The first conclusion drawn from the Foundation's survey indicates that violence against clinics is a persistent problem nationwide. In 1995, "38.6 percent of clinics experienced one or more of the most severe forms of clinic violence," including "death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson threats and arson attacks." *1995 Clinic Violence Survey Report*, at 3. More than 15 percent of the clinics experienced two or more different types of severe violence. *Id.* at 4. If vandalism, home picketing, and gunfire are also included, more than half of the clinics surveyed--a total of 55.8 percent--experienced some violence during 1995.

Even more disturbing is the breakdown of violent activities directed at clinic workers. Almost one in five clinics (17.1 percent) reported receiving death threats against its personnel, and more than one in ten (10.6 percent) reported that clinic staff had been stalked. The authors of the Survey conclude that the shift toward individualized threats to workers, rather than broad attacks on clinics, is in part attributable to the imposition of *Madsen*-



style injunctions and clinic buffer zones. *1995 Clinic Violence Survey Report*, at 6. This conclusion argues in favor of injunction provisions such as the buffer zone around individuals imposed by the District Court in this case, which will protect threatened clinic staff and patients, in addition to the protection of facilities offered by injunction provisions such as the fixed buffer zone upheld in *Madsen* (and, in a more restricted form, also used in this case). This type of injunction provision is no broader than the injunction upheld by this Court in *Madsen*; it simply responds to a somewhat different (but equally well-documented) problem than the lower court faced in that earlier case.

The second major conclusion drawn from the Foundation's 1995 Survey pertains to the specific administrative consequences of violence on the clinics surveyed. As a result of the targeting of individual workers by anti-abortion activists, clinics have long had a difficult time hiring and retaining staff, including key medical personnel such as doctors and nurses. "In 1995, 9% of clinics reported that staff members had quit as a result of anti-abortion violence and harassment." *1995 Clinic Violence Survey Report*, at 7. Not surprisingly, the clinics that were subject to the greatest incidence of violent attacks suffered the greatest staff attrition. "Of the clinics experiencing high levels of violence, 13.6% said staff members had resigned, compared with 9.3% of clinics reporting moderate violence and 7.3% of clinics reporting no violence." *Id.* The judicial interest in "protect[ing] a woman's freedom to seek lawful medical or counseling services in conjunction with her pregnancy," *Madsen*, 114 S.Ct. at 2526, necessarily encompasses the interest in protecting the personnel who perform these medical and

counseling services. Once again, although some provisions of the injunction in this case are specifically designed to protect clinic patients and personnel as opposed to clinic facilities, the underlying interests justifying the injunction here are the same as those endorsed by this Court in *Madsen*.

The third conclusion drawn from the Foundation's 1995 Survey is that effective law enforcement action correlates strongly with the diminution of violence against clinics. "Only 11%of clinics reporting excellent local law enforcement experienced high levels of violence, compared with 33.3% of clinics who reported poor law enforcement response." *1995 Clinic Violence Survey Report*, at 10. Similar patterns were evident with regard to state law enforcement response. Of particular note regarding the issues in the present appeal, death threats and stalking--two examples of violence that are likely to be controlled by the injunction provisions being challenged by Petitioners here--consistently correspond to effective law enforcement at every level. *Id.*

Despite the clear correlation between law enforcement effectiveness and the control of violence against clinics, two problems with law enforcement response to clinic violence are evident from the Survey. First, despite increased police efforts to work with clinics in response to violent activities of protesters, very few of the violent episodes reported by clinics led to arrests. "Only 13.8% of clinics reported arrests as a result of violence at clinics." *Id.* at 11. Second, primary protection of clinics continues to be left to local officials and federal and state judges, rather than federal law enforcement officials, despite the enactment in 1994 of the federal Freedom of Access to Clinics Act (FACE), 18 U.S.C. §248 (1996),



which makes anti-clinic violence a federal crime. The Survey found that among the clinics reporting FACE violations to the federal authorities, only 14.5 percent of the complaints were formally investigated, and the parties involved were officially interviewed only 12.9 percent of the time. *Id.* at 8. Only 8.1 percent of the complaints led to the filing of criminal proceedings. *Id.* Over half of the clinics filing FACE complaints (54.8 percent) were told that their claims should be handled locally. *Id.* This low level of criminal prosecutions by federal and local officials indicates the continued importance of precise and highly-focussed local remedies, such as injunctions and contempt actions. Existing remedies under broad state and federal criminal statutes simply have not provided adequate relief to stem the violence that many clinics in the United States continue to confront daily.

These problems are evident in this case. The District Court found that "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints about 'pro-life' demonstrators harassing patients and blocking access to the clinics." *Pro-Choice Network*, 799 F.Supp. at 1426. The District Court also found that "[e]ven when police arrest a 'pro-life' demonstrator for harassing a patient, successful prosecution is often difficult because the patient is reluctant to testify or cooperate out of fear that her identity might be made public. Furthermore, the record shows that arrest and conviction pursuant to local laws has not deterred defendants from repeatedly engaging in their illegal pattern of activity." *Id.* Local law enforcement of ordinary criminal statutes has been woefully inadequate to protect the staff and patients of clinics in western New York. As the District Court concluded, many of these problems can be

overcome by the imposition of an injunction, enforceable through contempt actions, including civil contempt actions brought by the plaintiffs.

The final conclusion that can be drawn from the Foundation's Survey serves to assuage Petitioners' concern that unless this Court's *Madsen* decision is limited to its facts, "it would follow from *Madsen* that courts could issue speech-restrictive injunctions virtually upon demand." Pet. Br. at 28. The results of the Foundation Survey demonstrates that this is certainly not how *Madsen* has been interpreted and applied by the lower courts that have been approached by clinics requesting injunctions. Although more than half of the clinics reported violence, only 35.5 percent of the clinics surveyed by the Foundation are currently covered by an injunction or buffer zone. *1995 Clinic Violence Survey Report*, at 11. Injunctions are not routinely requested by all clinics, nor do the courts automatically issue the injunctions that are requested. In 1995, only 15.2 percent of clinics requested civil legal relief (3.2 percent of these cases involved requests for temporary injunctions, 5.8 percent were requests for permanent injunctions, and 4.2 percent were requests for restraining orders). *Id.* Most of these requests for legal relief were denied. "Only 46.8% of clinics who sought legal remedies actually obtained the desired protection." *Id.* Only in the small category of requests for permanent injunctions--issued after full fact-finding by the trial courts--were most of the clinics (72.2 percent, or 13 of 18 clinics) successful in obtaining relief. *Id.* Thus, the survey results indicate that trial courts continue to review injunction requests rigorously and skeptically; there is no evidence whatsoever to support Petitioners' implication that *Madsen* is being used by trial courts to issue rubber-



stamp injunctions against anti-abortion protesters "virtually upon demand."

## V. THE INJUNCTION IN THIS CASE DOES NOT BURDEN MORE SPEECH THAN IS NECESSARY TO PROTECT THE CLINICS

The final issue in this case is whether the injunction entered by the District Court below burdens more speech than necessary to protect the various significant interests discussed in the previous sections of this brief. Petitioners find two provisions of the injunction particularly objectionable: First, they object to the buffer zone provision, which prohibits demonstrations within fifteen feet of clinic entrances and driveways, or within fifteen feet of persons or vehicles coming to or going from abortion facilities, *Pro-Choice Network*, 67 F.3d at 393; second, they object to the "cease and desist" provision, which permits up to two "sidewalk counselors" to enter the 15-foot buffer zone surrounding persons entering or leaving a clinic, but requires the counselors to "cease and desist from such counseling," and retreat from the zone if the person being approached "indicates, either verbally or non-verbally, that they do not wish to be counseled." *Id.* at 391.

Petitioners' argument that these provisions burden too much speech misconstrues both the injunction and this Court's holding in *Madsen*. Not only are these provisions actually narrower in key respects than the injunction provisions approved by this Court in *Madsen*, each of these provisions is well within the scope of equitable discretion provided to the lower courts by the *Madsen* decision.

Thus, Petitioners' challenge to the injunction must be rejected.

As a prelude to discussing the differences between the *Madsen* injunction and the injunction in this case, it is important to note the important ways in which the injunctions are the same. In *Madsen*, this Court upheld an injunction provision imposing a 36-foot buffer zone to the south and east of a clinic in Melbourne, Florida. In three key respects, the 36-foot buffer provision in *Madsen* is indistinguishable from the 15-foot buffer provision here. First, both provisions were devised as "a means of protecting unfettered ingress to and egress from the clinic." *Madsen*, 114 S.Ct. at 2527. *See Pro-Choice Network*, 799 F.Supp. at 1433 ("paragraph (b) of the preliminary injunction secures unfettered access to the clinics. . . ."). Second, both provisions were entered only after the trial courts "found that [protesters] repeatedly had interfered with the free access of patients and staff." *Madsen*, 114 S.Ct. at 2526. *See Pro-Choice Network*, 799 F.Supp. at 1424-27 (detailing District Court's findings regarding systematic blockading of clinics and harassment of clinic patients and staff). Third, both provisions rely upon "a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation." *Madsen*, 114 S.Ct. at 2527. *See Pro-Choice Network*, 799 F.Supp. at 1436 ("the 'cease and desist' provision shields only unwilling listeners from defendants' message"); *id.* at 1437 ("[protesters] can still picket, carry signs, pray, sing or chant in full view of people going into the clinics or just passing by.").



To the extent that the provisions of the injunction in this case are different than those in the *Madsen* injunction, the provisions challenged here are actually more speech-protective than the 36-foot buffer zone in that case. Most obviously, in this case the District Court imposed only a 15-foot buffer zone around the entrances and driveways of clinics. This zone is less than half as large as the 36-foot zone upheld in *Madsen*. This is important because unlike the provision upheld in *Madsen*, the buffer zone in this case does not have the effect of pushing demonstrators to the opposite side of the street from the clinic. Under the injunction upheld in this case, demonstrators can remain in close proximity to the clinic entrances, so long as they do not block those entrances. Thus, the demonstrators' placards and signs can be seen easily by those coming into a clinic, and demonstrators will have no trouble communicating verbally with those approaching the clinic entrances. *See Pro-Choice Network*, 799 F.Supp. at 1436.

With regard to the "floating" 15-foot buffer zone around persons approaching or leaving the clinics, Petitioners hyperbolically envision a situation in which "picketers, leafletters, and anyone else who could be characterized as 'demonstrating' must flee from approaching pedestrians on pain of contempt." Pet. Br. at 49. Petitioners paint a picture of being "bulldozed" off the sidewalks by patients going to or coming from clinics: "If a placard-carrying individual should fail to pay close attention in all directions, a 'speech-free bulldozer' may run him over before he has time to conceal his sign." *Id.* Of course, none of these speculations are based on any evidence in the history of this case. No one has ever been held in contempt for coming too close to another

pedestrian while innocently trying to avoid contact with a person en route to a clinic. The reality of the protesters' behavior is quite different, and was noted by the District Court in its opinion issuing the preliminary injunction: "There was testimony adduced at the hearings that defendants have attempted to circumvent [a similar provision in the TRO] by using a 'relay' system, *i.e.*, once the targeted person rejects the counseling of a particular 'sidewalk counselor,' another one steps forward and continues counseling. This 'relay' system obviously violates the spirit, if not the letter, of the Court's TRO." *Pro-Choice Network*, 799 F.Supp. at 1435 n.12. Protesters around clinics in western New York do indeed "pay close attention in all directions," but they do so in order to ambush frightened clinic patients, not to get out of their way.

Evidence such as this points to the necessity of the buffer zone surrounding those going to and from the clinics. In the absence of such a buffer, protesters would have free rein to engage in the very conduct that the District Court found was common among demonstrators outside clinics in the Buffalo area prior to the issuance of the TRO: "During these encounters, 'sidewalk counselors' often become angry and frustrated when patients and patient escorts persist in entering the clinics. The 'counselors' then turn to harassing, badgering, intimidating and yelling at the patients and patient escorts in order to dissuade them from entering." *Id.* at 1425 (footnote omitted). This Court noted in *Madsen* that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation." *Madsen*, 114 S.Ct. at 2529 (quoting *International Society for Krishna Consciousness (ISKCON) v. Lee*, 505 U.S. 672, 684 (1992)). Nothing in *Madsen* or any other First Amendment case provides



protesters the absolute right to engage in aggressive, face-to-face harassment of individuals.

Petitioners repeatedly argue that the buffer zone surrounding individuals entering or leaving a clinic creates a "speech-free zone." *See* Pet. Br. at 44, 45, 46, 47, 48. Although this is an accurate description of the 36-foot buffer zone upheld by this Court in *Madsen* (which contained no exceptions for speech by protesters), it does not accurately characterize the "floating" buffer zone created by the injunction in this case. In this case, the District Court specifically permitted up to two sidewalk counselors to enter the 15-foot buffer zone surrounding individuals, but required such counselors to "cease and desist" their approach if the person approached indicated a desire to be left alone.

Petitioners challenge the "cease and desist" provision by analogizing it to the provision of the *Madsen* injunction prohibiting protesters from approaching persons seeking the services of a clinic within a 300-foot zone around the clinic. This Court struck down that provision on the ground that it prohibited "all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be. . . ." *Madsen*, 114 S.Ct. at 2529. The simple answer to Petitioners' analogy is that the relevant provision in this case does *not* prohibit "all uninvited approaches." In fact, the injunction specifically *permits* such approaches. What the provision *does* prohibit is the forced imposition on a listener of speech that the listener does not want to hear. Petitioners' analogy to *Madsen* is inapt because there is a fundamental difference between an injunction that prohibits someone from "selling" his or her perspective in the marketplace of

ideas, and an injunction that prohibits a speaker from forcing a listener to "buy" the speaker's perspective.

Petitioners' own citations underscore this difference. Petitioners cite Justice Souter's opinion from *ISKCON v. Lee*, in which Justice Souter noted that in the face of an insistent solicitor, "a pedestrian on the street . . . can simply walk away or walk on." *ISKCON v. Lee*, 505 U.S. at 713 (Souter, J., concurring in part and dissenting in part), cited in Pet. Br. at 39. But Petitioners failed to note Justice Souter's reference to the fact that in *ISKCON* "there is here no evidence of any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban. . . ." *Id.* This case is a good example of the "coercive conduct" that Justice Souter recognized might justify a regulation of face-to-face speech. In this case, the District Court had abundant evidence of coercive abuse of clinic patients by protesters. Petitioners fail to acknowledge the District Court's finding that "counselors" often "turn to harassing, badgering, intimidating, and yelling at the patients and patient escorts in order to dissuade them from entering [the clinics]. They continue to do so even after the patients signal their desire to be left alone." *Pro-Choice Network*, 799 F.Supp. at 1425. The "cease and desist" provision in the injunction was thus narrowly tailored to preserve the right of protesters to approach pedestrians peacefully, while at the same time preserving the right of clinic patients to avoid the kind of harassment and abuse that had become common at the time the injunction was issued.

In sum, each provision of the injunction challenged by Petitioners satisfies the *Madsen* requirement that it burden no more speech than necessary to protect clinic



patients and personnel from harassment and coercion. As the Court of Appeals held, the injunction does no more than preserve the rights of patients and clinic personnel, while leaving intact the protesters' First Amendment right to "approach anyone else to attempt to 'counsel' them, or to hand out leaflets to passersby, or to demonstrate as she sees fit within the bounds of the injunction." *Pro-Choice Network*, 67 F.3d at 391.

## CONCLUSION

This Court should affirm the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX A

## 1995 CLINIC VIOLENCE SURVEY REPORT

**Conducted by**
**THE FEMINIST MAJORITY FOUNDATION**

## 1995 CLINIC VIOLENCE SURVEY REPORT
## FEMINIST MAJORITY FOUNDATION

### METHODOLOGY

For the third consecutive year, the Feminist Majority Foundation conducted a nationwide survey of anti-abortion violence that occurred during the first seven months of 1995. In September of 1995, surveys were mailed to 902 clinics in the United States, and American Samoa. Follow-up phone calls to clinics were made in September and October. Surveys were completed by 310 clinics, producing a response rate of 34%. Data were analyzed using SPSS-X (Statistical Package for the Social Sciences) uni-variate and bi-variate statistical techniques. This annual survey represents one of the most comprehensive studies of anti-abortion violence directed at clinics, patients, and health care workers.

The sample of 310 clinics in the 1995 survey includes facilities in 44 states and American Samoa. (See Appendix A for list of number of clinics per state.) The percentage of clinic practice devoted to abortion ranges from less than 5% to over 75%. Clinics represented in the sample are almost evenly divided among facilities that are non-profit (31%), for-profit (38.1%), and private doctors offices (30%).

Many of these clinics provide a wide range of gynecological and other health care services. The 1995 survey found that 94.8% of clinics provide health services in addition to abortion. Clinics provide birth contol (92.6%), cancer screening

(68.1%), pre-natal care (24.8%), menopause treatment (58.1%), tubal sterilization (29.7%), adoption and referral services (22.3%), infertility treatment (26.8%), PMS Treatment (51.6%), AIDS Testing (60%), reproductive health counseling (83.2%), pregnancy counseling (86.8%), and STD testing and treatment (82.3%).

Clinics that responded to the survey were assured that their individual responses would remain confidential. Clinics are identified by name or state only if the incidents and consequences of the violence are a matter of public record or if the Feminist Majority Foundation was given permission to include the details of the incident in this report.

## KEY FINDINGS

- Levels of clinic violence in 1995 declined substantially. In 1995, 38.6% of clinics experienced one or more of the most severe forms of clinic violence, including death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson and arson threats. This rate is down significantly from 51.9% of clinics in 1994 and 50.2% in 1993. The proportion of clinics experiencing one or more types of violence grew to 55.8% when home picketing, vandalism, and gunfire also were tabulated. In 1994, 66.7% of clinics experienced at least one of the twelve types of violence.

- For the first time, in every category of violence, more clinics in 1995 reported decreases than increases in incidents. The smallest net decreases, however, were in reports of death threats and stalking.

- Violence directed at individual physicians and clinic staff members continued at unacceptably high levels. Almost one in five clinics (17.1%) reported death threats in 1995; one in five (20.3%) reported home picketing; and one in ten (10.6%) said clinic staff had been stalked.



- Violence directed at physicians and clinic staff has taken its toll. Clinic staff resignations as a result of anti-abortion violence remained at 1994 levels, with almost one in ten (9%) of clinics having lost clinic staff for this reason. The majority (60.7%) of violence-related staff resignations occurred as a result of the December 30, 1994 murders of clinic workers in Brookline, Massachusetts.

- One in five clinics reported violations of the Freedom of Access to Clinic Entrances Act to federal law enforcement officials, representing an increase from 16.5% in 1995. The majority (54.8%) of clinics reporting FACE violations were directed by federal authorities to seek assistance from local and state laws and law enforcement officials.

- Decreases in clinic violence corresponded with law enforcement response. Local, state, and federal law enforcement officials won higher marks from clinics for their response to anti-abortion violence in the (sic) 1995 than in 1994. The greatest improvement in law enforcement response was seen at the local level, where 34.5% of clinics reported enforcement efforts had "improved."

- Clinic demands for legal remedies from the courts experienced mixed success. In 1995, 15.2% of clinics sought judicial relief from clinic violence, but less than half (46.8%) actually obtained the legal remedy sought. Over one-third (35.5%) of clinics are now protected by a buffer zone or civil injunction.

## RESULTS

### Anti-Abortion Violence Declines in 1995; One-third of Clinics Still Under Serious Attack

One year after passage of the Freedom of Access to Clinic Entrances Act and a U.S. Supreme Court ruling allowing the creation of "buffer zones" around women's health care clinics,

*the level of violence at abortion clinics has declined significantly.* However, *over one-third of clinics remained under serious attack by anti-abortion forces during the first seven months of 1995.*

*In 1995, 38.6% of clinics experienced one or more of the most severe forms of clinic violence.* Types of violence included *death threats, stalking, bomb threats and bombings, chemical attacks, blockades, invasions, and arson threats and arson attacks.* This level of violence represented a drop of 13.3 points from 51.9% of clinics in 1994 and a drop of 11.6 points from 50.2% in 1993. (See Chart 1.)

As Chart 2 shows, 22.3% of clinics in 1995 experienced one type of violence, 10% reported two types, 4.2% were the targets of three types of violence, and .9% experienced four or more types of violence. Chart 2 also compares 1995 levels of violence with 1993 and 1994.

Both the 1995 and 1994 surveys also measured additional types of violence: *vandalism, home picketing, and gunfire.* When these variables are incorporated, *the percentage of clinics that experienced violence in 1995 grows to 55.8%.* In 1994, 66.7% of clinics were the targets of one or more of these ten types of violence.

Collapsing the twelve violence variables into three levels of violence further revealed the decline in intensity of violence between 1995 and 1994. In 1995 14.2% of clinics were heavily targeted experiencing a high level of violence (3 or more types), compared with 22.2% in 1994. In the 1995 survey, 41.6% reported a moderate level of violence (1 or 2 types); 44.5% experienced moderate levels of violence in 1994. In 1995, 44.2% of clinics had not experienced any of these types of violence; one third (33.3%) of clinics in 1994 indicated they had not faced anti-abortion violence.



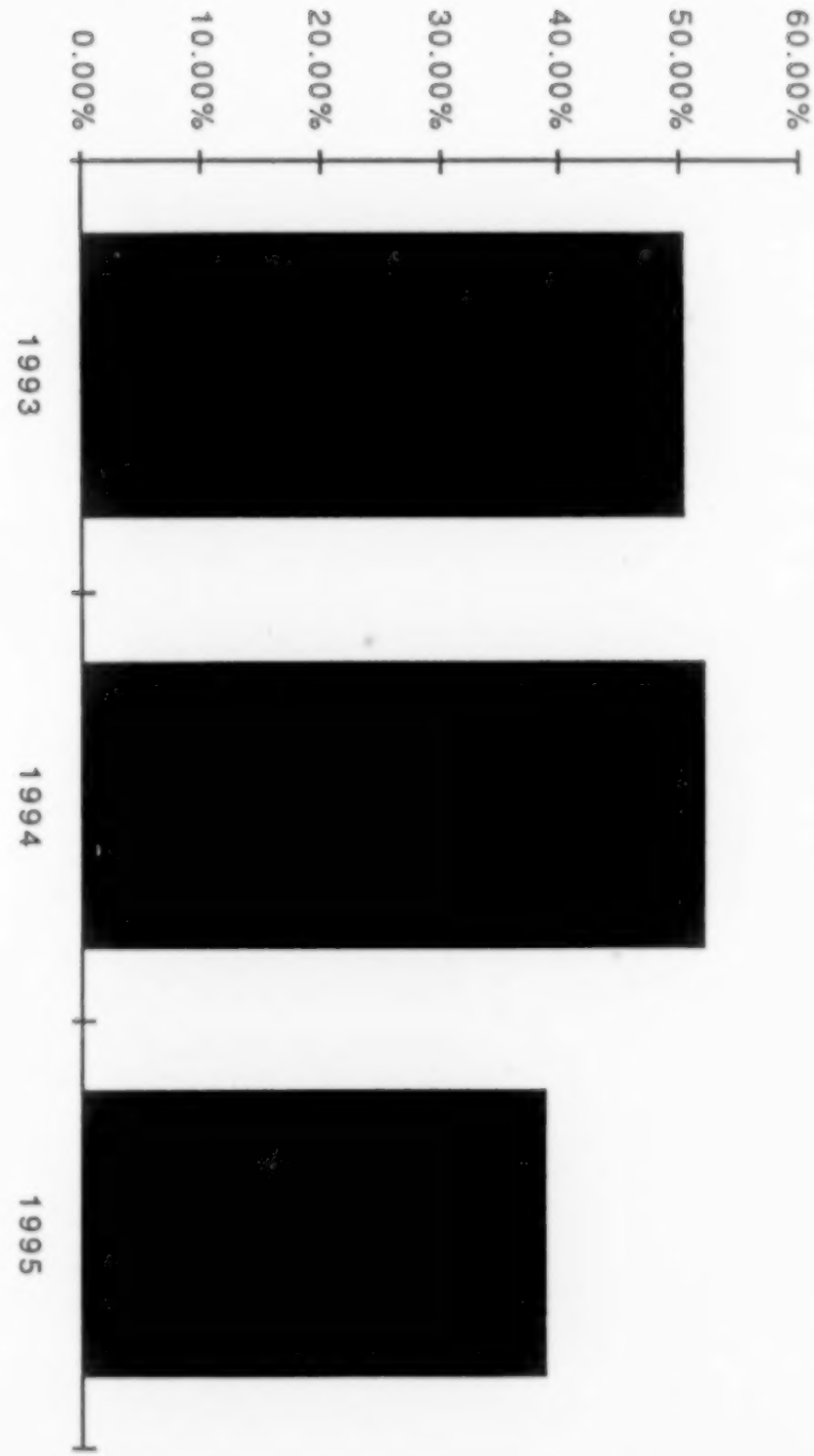
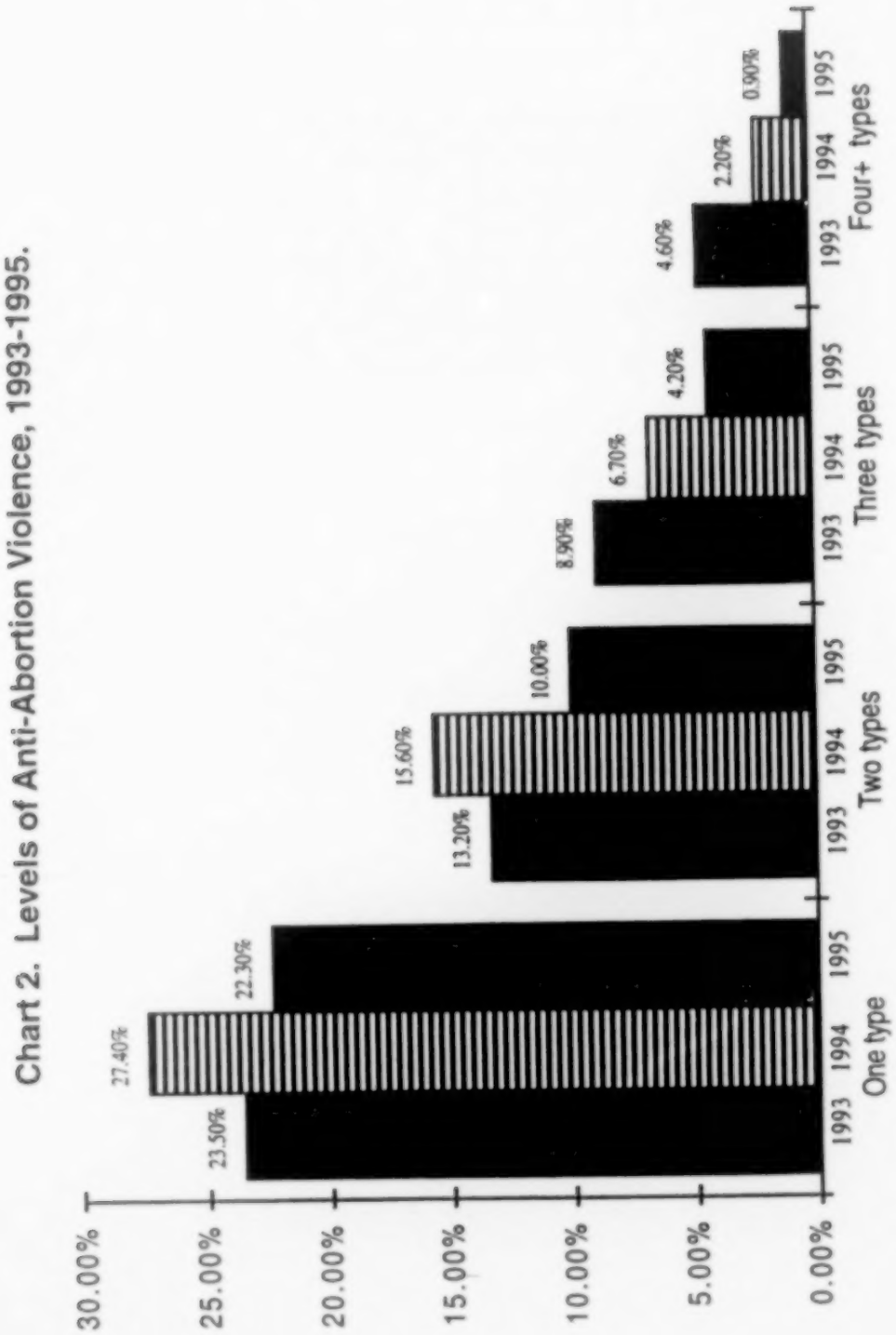



**Chart 1. Clinics Experiencing One or More Types of Anti-Abortion Violence, 1993-1995.**






Violent acts against clinics and health care workers were nationwide. The survey, however, revealed especially severe anti-abortion violence in Alabama, California, Colorado, Florida, Kansas, Massachusetts, North Dakota, North Carolina, Oklahoma, Oregon, Texas, and Wisconsin.

## Death Threats, Home Picketing, and Stalking Still Terrorize Many Physicians and Clinic Workers

While overall clinic violence decreased in 1995, *the types of violence that target physicians and clinic staff at their homes and offices remained at high levels*. Almost *one in five clinics (17.1%) reported death threats* in 1995; *one in five (20.3%) reported home picketing;* and *one in ten (10.6%) said clinic staff had been stalked*. While these reports of death threats, stalking, and home picketing also represented declines since 1994, this violence still posed a significant threat to abortion providers. (See Chart 3).

*Relatively few clinics in 1995 reported blockades (6.5%), invasions (5.8%), or chemical attacks (1%).* Bomb threats were reported by 14.5% of clinics.

Vandalism was the most highly reported type of violence, with almost one-fourth (24.8%) of clinics reporting that their facilities had been vandalized. Acts of vandalism included glue in door locks (5.2%), nails in clinic driveways or parking lots (2.9%), motor oil in parking lot (1.9%), paint on building (8.1%), and broken windows (9.4%). Other forms of vandalism included destruction of property and landscaping, disposal of trash on clinic property, placement of locks on clinic doors and gates, and tampering with clinic utilities such as electricity and water.

*Facing the mobilization of abortion rights activists at clinics, protest injunctions, and buffer zones, anti-abortion extremists largely have abandoned clinic blockade and clinic invasion strategies in favor of more threatening strategies aimed at par-*

**Chart 5. Clinic Reports of Blockades, Invasions, Death Threats, and Stalking , 1993-1995**

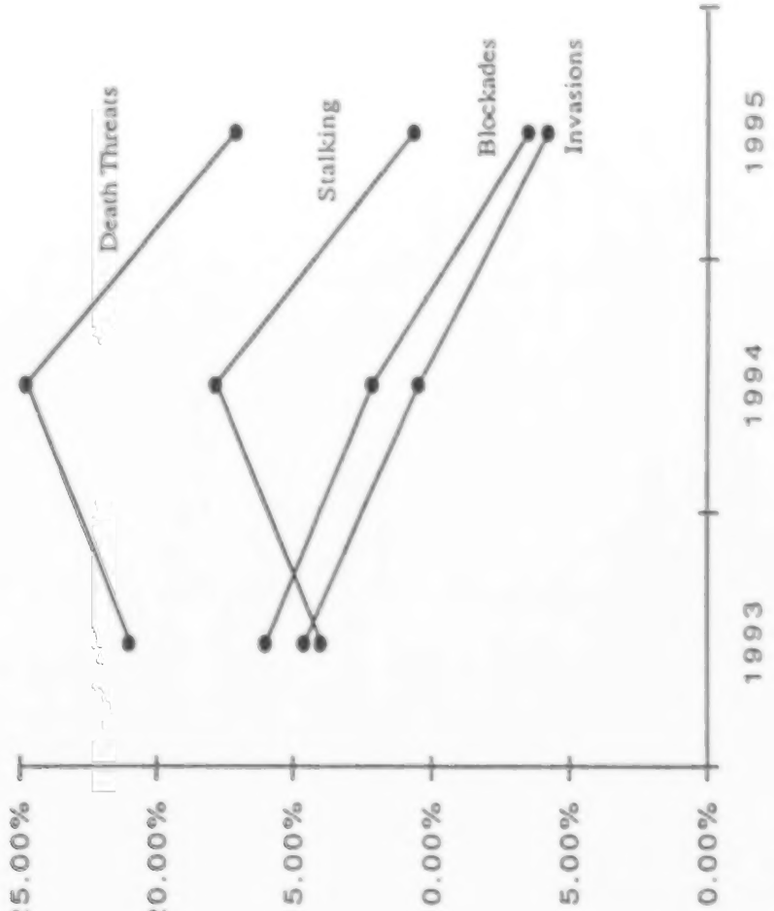
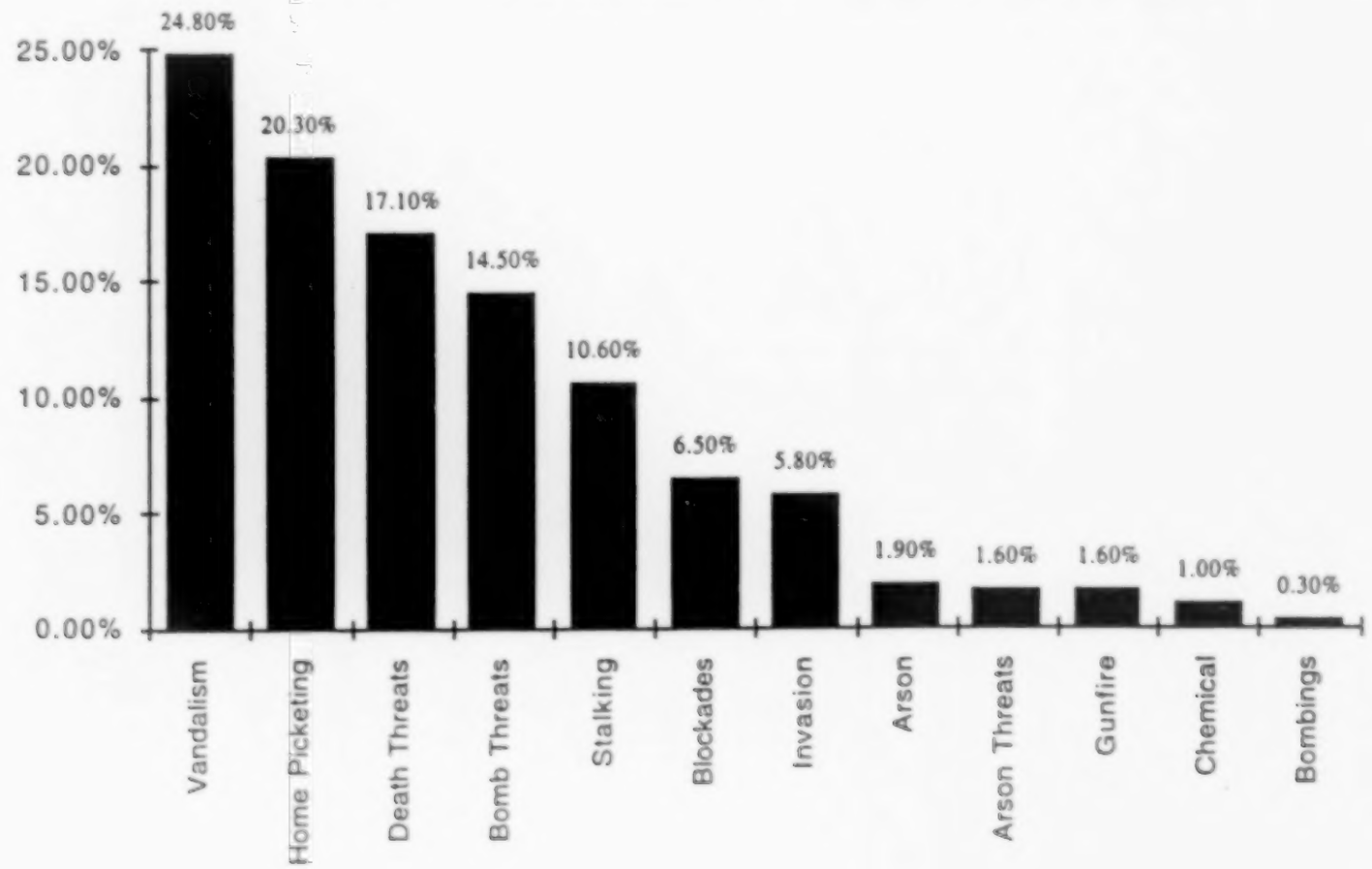





**Chart 3. Violence By Type During First Seven Months of 1995**



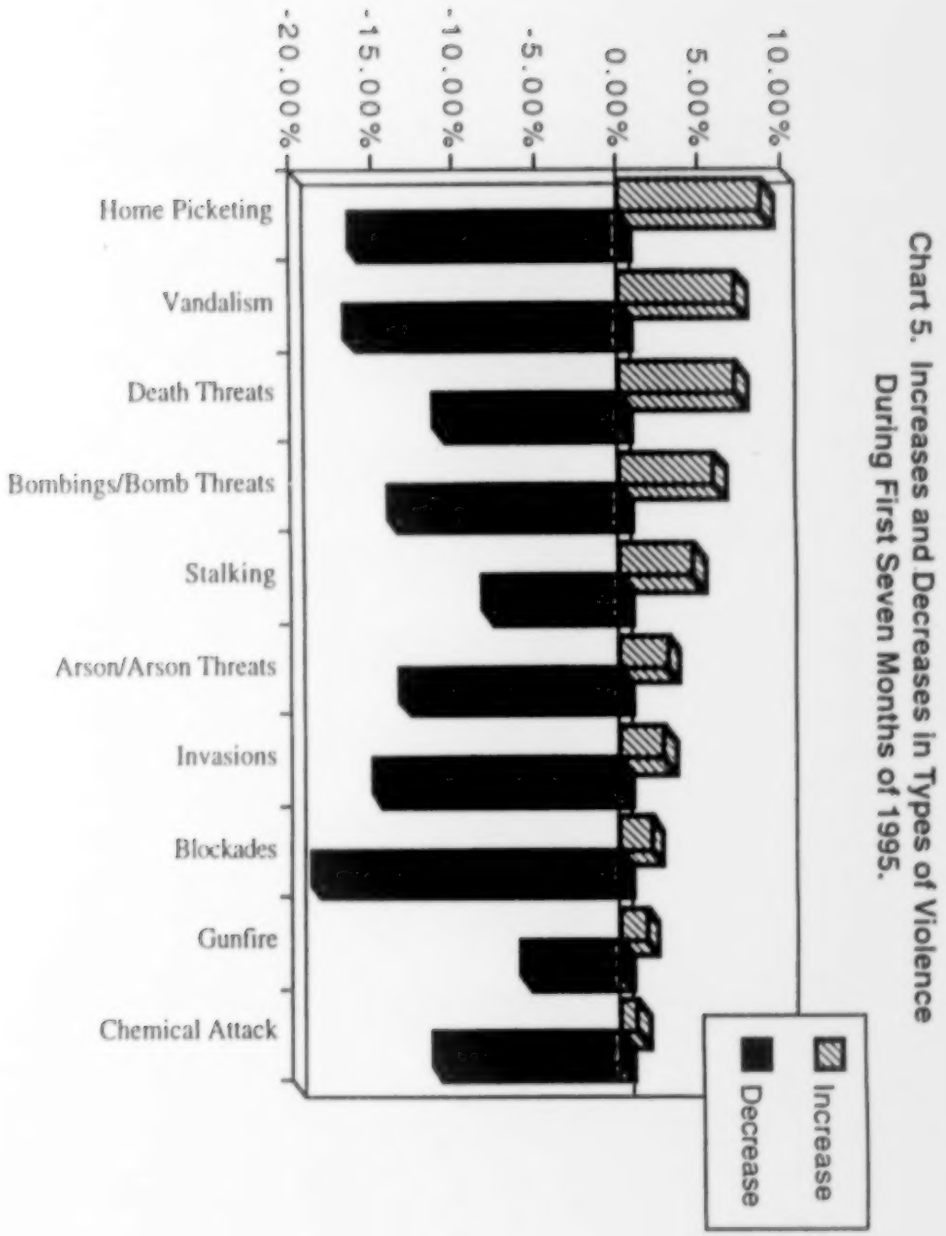



**Chart 5. Increases and Decreases in Types of Violence During First Seven Months of 1995.**



*ticular physyicians and clinic workers such as death threats, stalking, and home picketing*. Chart 5 illustrates the patterns of decline in various types of violence over the past three years, based on our annual surveys.

*For the first time, in every category of violence, more clinics in 1995 reported decreases than increases in incidence*. Chart 5 reveals reported increases and decreases in specific types of violence in 1995, compared with 1994. Significantly, however, *the smallest net decreases occurred in death threats and stalking*.

## One In Ten Clinics Lose Staff As A Result of Anti-Abortion Violence

Clinics continued to lose staff as a result of anti-abortion violence. *In 1995, 9% of clinics reported that staff members had quit as a result of anti-abortion violence and harassment*. A similar number of clinics reported violence-related resignations in 1994. Both 1994 and 1995 levels of staff resignations represented a major decline from 1993, when one-fourth of clinics said they had lost staff members because of fears of violence.

*Clinics which were the most heavily besieged by violence were the most likely to lose staff members*. Of the clinics experiencing high levels of violence, 13.6% said staff members had resigned, compared with 9.3% fo clinics reporting moderate violence and 7.3% of clinics reporting no violence.

The murder of two clinic workers and shooting of five other people in Brookline, Massachusetts on December 30, 1994 sent shockwaves through the nation. The attacks especially intensified fear among staff members at clinics around the country. *Over sixty percent (60.7%) of clinics which reported staff losses as a result of violence in 1995 said those staff members had quit as a direct result of the Brookline murders*.

## One In Five Clinics Reported FACE Violations

*One in five clinics (20%) surveyed said they had reported violations of the Freedom of Access to Clinic Entrances Act (FACE) to federal law enforcement officials* — an increase in reports from 16.5% in 1994.

Enacted in May of 1994, FACE makes anti-abortion violence a federal crime. The Act provides federal jurisdiction and enacts specific federal penalties, including felony offenses and civil fines, for those convicted of using force, the threat of force, or physical obstruction against patients, health care workers, and clinics.

The federal government's enforcement of FACE increased substantially in 1995. According to the Department of Justice, the first full year of FACE implementation resulted in 133 criminal civil rights investigations, 15 indictments, and 15 convictions. Nine FACE civil actions were brought by the federal government. In 1995, the U.S. Supreme Court also rejected the American Life League's challenge to the constitutionality of FACE.

Key events in FACE enforcement in 1995 included the conviction of Paul Hill for the 1994 murders of Dr. John Bayard Britton and clinic escort James Barrett and shooting of June Barrett. A possible murder of a physician was averted in August of 1995 when the FBI arrested Robert Cook, an anti-abortion extremist, who allegedly robbed an armed car of $260,000 and planned to use the money to "fund a war against abortion." Cook was arrested just days before he planned to start his war by killing an abortion doctor. Cook was convicted of FACE violations as well as larceny, money laundering, and solicitation.

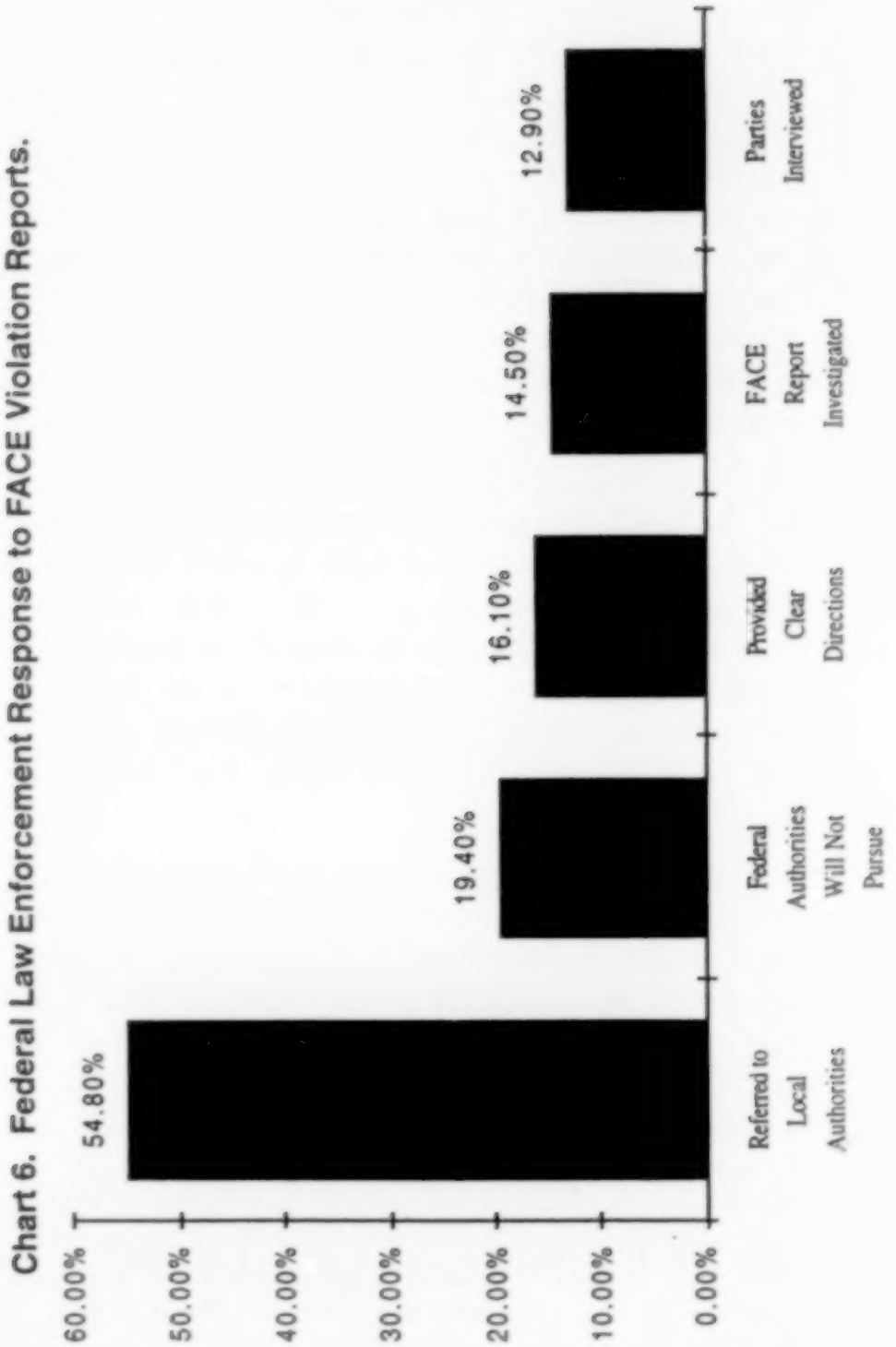
While FACE enforcement steadily improved in 1995, federal officials were still reluctant to use FACE to address many instances of clinic violence. *The 1995 survey found that the majority of FACE reports that clinics made to federal officials were referred to local law enforcement officials.* Of the 62 clinics making FACE reports, 54.8% were told their claims should be handled under local and state laws. *Almost one-fifth (19.4%) of clinics reporting FACE violations said that they were advised that federal authorities would not prosecute.* Only 16.1% of clinics that reported FACE violations said that law enforcement officers provided clear directions for initiating formal FACE complaints. *Only 14.5% of clinics reported that their FACE reports were formally investigated* and just 12.9% said involved parties were officially interviewed. (See Chart 6.)



*Very few clinics reporting FACE violations said their reports had resulted in civil or criminal action under the federal law.* Reported FACE violations resulted in FACE criminal proceedings for only 8.1% of clinics. Only 4.8% of clinics that reported FACE violations pursued FACE civil action. U.S. attorneys intitiated FACE complaints for 8.1% (25) of the clinics. Of the clinics surveyed, one won a FACE civil suite, three won FACE injunctions, and one clinic won FACE criminal charges.

*For-profit clinics were more likely than non-profit clinics or private doctors offices to report FACE violations.* In 1995, 43.5% of FACE violations were reported by for-profit clinics, with non-profit clinics accounting for 30.6% and private doctors offices accounting for 24.2% of FACE reports. This pattern represents a shift from the 1994 data which showed far more non-profit clinics than for-profit or private doctors office facilities reporting violations of FACE.

The majority (60.6%) of clinics said that they had been informed by federal authorities of the appropriate FACE contact in the U.S. Attorneys office in their districts.






## Law Enforcement Response Improved in 1995

*Local, state, and federal law enforcement officials won higher marks from clinics for their responses to anti-abortion violence in the 1995 than in 1994.* Local law enforcement response was ranked as "excellent" by 43.9% of clinics in 1995, with 32.3% calling local law enforcement response "good," and 8.7% of clinics reporting "poor" responses. In 1994, 30.3% of clinics reported that local law enforcement response was "excellent;" 35.4% said local response was "good;" and 11.5% of clinics experienced local response as "poor."

Federal law enforcement received significantly higher ratings from clinics in 1995 than in 1994. Of the clinics, 20.3% reported "excellent" federal response in 1995, with 31% of clinics saying federal response was "good" and 12.9% stating they had experienced a "poor" response from federal officials. In 1994, only 10.5% of clinics had reported an "excellent" response from federal law enforcement, 21.3% said the federal response was "good" and 8% characterized federal response as "poor."

Clinics ranked state law enforcement response lower. State law enforcement response was identified by 15.5% of clinics as excellent, 24.5% as good, and 8.1% as poor. These results, however, showed significant improvement in state response since 1994, when 7.3% of clincis reported state response as excellent, 15.9% as good, and 8.9% as poor.

The 1995 survey results also suggested that clinics were interacting more with law enforcement officials at all levels than in the past. In 1995, only 15% of clinics responded "don't know" to questions about local law enforcement response, compared with 22.9% in 1994. Slightly over one-half of clinics (51.9%) were unable to describe state law enforcement response to clinic violence, but this still represented improvement since 1994 when 67.8% could not characterize state enforcement efforts. Similarly, 35.8% of clinics in 1995 responded

"don't know" when asked to rank federal law enforcement response, compared with 60.2% in 1994.

Another measure found a significant number of clinics in 1995 interacted with federal officials. Over two-thirds (68.1%) of clinics reported that they had been contacted by U.S. marshals about clinic violence.

Most clinics reported little change in local, state, or federal response to clinic violence when asked to compare 1995 levels of response with their experiences in 1994. The plurality of clinics said local (46.1%), state (40.6%), and federal (42.3%) response "remained the same" as in the previous year. Very few clinics reported that law enforcement response at any level had declined.

Clinics reported the most improvement in local law enforcement response, followed by federal response. Of the clinics, 34.5% said local law enforcement response had "improved," while 26.5% noted improvements in response from federal law enforcement. 17.7% of clinics said state law enforcement response had "improved."

## Levels of Violence Correlate with Law Enforcement Response

*A clear relationship between clinic violence and law enforcement response emerged from the 1995 survey data.* Only 11% of clinics reporting excellent local law enforcement experienced high levels of violence, compared with 33.3% of clinics who reported poor law enforcement response.

A similar pattern appeared in relation to state law enforcement response. Of those clinics experiencing a poor state law enforcement response, 28% report high levels of clinic violence; only 14.6% of clinics reporting excellent state law enforcement response experienced high levels of violence.



*Death threats, in particular, are consistently related to local, state, and federal law enforcement response.* Better law enforcement response corresponded with fewer death threats. Bombings/bomb threats, vandalism, and death threats had statistically significant relationships with federal law enforcement response. Statistically significant relationships also were found between local law enforcement response and death threats, stalking, vandalism, blockades, and invasions. Stalking and death threats were the only two types of violence that correlated with state law enforcement response at a significant level.

Another indication of law enforcement response was the number of clinics that reported arrests and whether charges were filed in these cases. *Only 13.8% (43) of clinics reported arrests as a result of violence at clinics.* Of the clinics, 11.6% (36) reported misdemeanor arrests or arrests for violation of local ordinances; 1.6% (5) reported felony arrests; and .6% (2) reported both misdemeanor/felony.

Arrests were clearly related to the levels of violence experienced by clinics. Clinics that experienced higher levels of violence indicated more arrests regardless of whether the violent acts took place at or away from clinics. Over one-third (36.3%) of the clinics that experienced a high level of violence reported arrests for felonies and misdemeanors committed at clinics. Only 14.7% of clinics affected by moderate levels of violence reported arrests for anti-abortion activities at the clinics. Of the clinics that reported high levels of violence, 11.4% noted either felony or misdemeanor arrests related to violence that took place away from clinics. Only 3.9% of clinics that reported moderate levels of violence also indicated arrests for conduct away from clinics.

*Approximately one-third of clinics that reported misdemeanor and local ordinance arrests also indicated that charges were filed*

*as a result of the arrests.* Of the 36 clinics reporting misdemeanor/local ordinance arrests related to anti-abortion violence at clinics, 33.3% said charges were filed and another 5.6% said charges were filed in some cases, but not others. Of the 8 clinics that reported misdemeanor/local ordinance arrests related to anti-abortion violence targeted at physicians and staff away from clinics, 37.5% said charges were filed. All of the clinics that reported felony arrests said charges were filed. One of the two clinics that reported both felony and misdemeanor arrests related to violence at clinics said charges were filed.

## Less Than Half of Clinics Won Legal Protections

*Over one-third (35.5%) of clinics are currently protected under civil injunctions or buffer zones.*

*In 1995, 15.2% of clinics turned to the courts to seek relief from clinic violence.* Of the clinics, 3.2% sought temporary injunctions, 5.8% permanent injunctions, and 4.2% restraining orders.

*Only 46.8% of clinics who sought legal remedies actually obtained the desired protection.* Clinics in 1995 were less successful than in 1994 in winning restraining orders and temporary injunctions to protect themselves from clinic violence. In 1995, 46.2% of the clinics requesting temporary restraining orders against anti-abortion extremists won restraining orders, compared with 68.8% in 1994. Fifty percent of clinics who sought temporary injunctions in 1995 won those injunctions, in comparison to 62.5% of clinics in 1994.

On the other hand, *clinics in 1995 were extremely successful in obtaining permanent injunctions.* All but 5 of the 18 clinics that sought permanent injunctions won those injunctions, for a total of 72.2%. In 1994, only 27.8% of clinics seeking permanent injunctions won that legal remedy.



## CONCLUSIONS

Levels of clinic violence in 1995 declined substantially. Fewer clinics reported incidents of death threats, stalking, home picketing, vandalism, chemical attacks, blockades, arson and arson threats, invasions and gun fire. In every category of violence, more clinics reported decreases than increases.

Violence directed at individual physicians and clinic staff, however, continues at unacceptably high levels. Almost one-fifth (17.1%) of clinics reported death threats in 1995. A similar proportion (20.3%) of clinics indicated that the homes of clinic staff and physicians had been picketed. One in ten (10.6%) clinics said staff and physicians had been stalked by anti-abortion extremists. Of all the types of violence, death threats had the smallest net decrease in 1995.

And these types of violence have taken their toll on clinic staff. One in ten clinics still report that staff members have quit as a result of anti-abortion violence. The murders of clinic staff in Brookline Massachusetts by John Salvi accounted for almost two-thirds of these resignations.

Decreases in clinic violence were tied directly to law enforcement response. The survey found statistically significant correlations between levels of violence and local, state, and federal law enforcement response. The level of death threats appeared to be particularly sensitive to law enforcement activities. Death threats were the only types of violence in which a statistically significant relationship was indicated with local, state, *and* federal law enforcement activities.

Clinics consistently reported that law enforcement at the local, state, and federal levels had improved. These improvements without question have helped diminish anti-abortion violence overall. However, clinics also reported that implementation of the Freedom of Access to Clinic Entrances Act has

not been as vigorous as it could be. Although one in five clinics reported FACE violations, very few of these reports resulted in criminal or civil action. Enforcement of FACE and the increased involvement of federal and state as well as local officials clearly is necessary to end the serious violence which continues to plague a significant proportion of clinics in the United States.



## APPENDIX A
## Clinics Responding to Survey State-by-State

| | |
|---|---|
| Alabama | 7 |
| Arizona | 10 |
| Arkansas | 3 |
| California | 41 |
| Colorado | 5 |
| Connecticut | 10 |
| Florida | 24 |
| Georgia | 4 |
| Illinois | 5 |
| Indiana | 5 |
| Iowa | 5 |
| Kansas | 5 |
| Kentucky | 1 |
| Louisiana | 4 |
| Maine | 2 |
| Maryland | 9 |
| Massachusetts | 5 |
| Michigan | 16 |
| Minnesota | 5 |
| Mississippi | 1 |
| Missouri | 2 |
| Montana | 3 |
| Nebraska | 1 |
| Nevada | 4 |
| New Hampshire | 3 |
| New Jersey | 8 |
| New Mexico | 2 |
| New York | 22 |
| North Carolina | 10 |
| North Dakota | 1 |

| | |
|---|---|
| Ohio | 16 |
| Oklahoma | 2 |
| Oregon | 5 |
| Pennsylvania | 7 |
| Rhode Island | 2 |
| South Carolina | 2 |
| South Dakota | 1 |
| Tennessee | 6 |
| Texas | 17 |
| Utah | 2 |
| Vermont | 5 |
| Virginia | 5 |
| Washington | 9 |
| Wisconsin | 5 |
| American Samoa | 1 |
| | 310 |



## APPENDIX B
## State-by-State Analysis For Twelve States With Highest Levels of Anti-abortion Violence During the First Seven Months of 1995

***Alabama***

Four of the seven Alabama clinics received death threats. Three clinics received bomb threats. One clinic received an arson threat. Three clinics were vandalized. One clinic reported staff members had been picketed at home. Three clinics reported stalking. One clinic said staff had quit as a result of anti-abortion violence. Four clinic reported FACE violations. One clinic is protected by an injunction or buffer zone.

***California***

Only four out of forty-one clinics in California reported blockades. Three clinics faced invasions. Nine clinics received bomb threats. Two clinics experienced arson. Twelve clinics experienced vandalism. Four clinics reported home picketing. Four clinics reported death threats. One clinic reported gunfire. Two clinics reported violence-related staff resignations. Six clinics informed authorities of FACE violations. Six clinics said they were protected by buffer zones or injunctions.

***Colorado***

One of the five clinics in Colorado was invaded during the first seven months of 1995. A bomb threat was received by one clinic. Two clinics were vandalized. One clinic said staff experienced home picketing. Two clinics reported staff members had been stalked. Two clinics reported death threats. Two clinics lost staff as a result of violence. Two clinics told federal authorities of FACE violations. One clinic reported a suit for civil damages had been filed under FACE. Two clinics said they had buffer zones or injunctions.

***Florida***

Only one of twenty-four clinics in Florida reported blockades. One clinic received a bomb threat. One clinic was set on fire. Four clinics reported vandalism. Three clinics reported home picketing. Two clinics reported that staff members had been stalked. Four clinics received detah threats. One clinic reported staff resignations as a result of clinic violence. Four clinics reported FACE violations. Buffer zones or injunctions are in place at nine clinics.

***Kansas***

One of the five Kansas clinics experienced arson. Two clinics were vandalized. Two clinics said staff were picketed at home. Two clinics reported stalking. Three clinics received death threats. One clinic informed federal authorities of FACE violations. One clinic reported a FACE civil suit had been filed. One clinic reported FACE criminal charges had been filed. One clinic has a buffer zone or injunction.

***Massachusetts***

Three of the five Massachusetts clinics reported bomb threats. One clinic reported home picketing. Staff members at two clinics were stalked. Death threats were received by three clinics. One clinic reported gunfire. One clinic reported staff members had quit as a result of anti-abortion violence. One clinic reported FACE violations. Five clinics are protected under an injunction.

***North Carolina***

Three out of the ten North Carolina clinics experienced blockades in the first seven months of 1995. Two received bomb threats. Four clinics were vandalized. Three clinics reported staff members had been picketed at home. Two clinics had staff members who had been stalked. Four clinics reported death threats. Four clinics told federal authorities of FACE violations. Two clinics reported FACE criminal



charges had been filed. Two clinics are protected by buffer zones or injunctions.

***North Dakota***

The lone North Dakota clinic reported home picketing, death threats, and stalking. The clinic also reported FACE violations to federal officials. A buffer zone or injunction was in place at the clinic.

***Oklahoma***

One of the two clinics from Oklahoma in the sample was hit by a blockade. One clinic was vandalized. One clinic said staff were picketed at home. Staff members of one clinic were stalked.

***Oregon***

One of the five Oregon clinics reported a blockade. Two clinics were invaded. One clinic experienced vandalism. All five clinics reported picketing at the homes of staff members and physicians. One clinic reported death threats. One clinic reported staff had quit because of anti-abortion violence. FACE violations were reported at one clinic. One clinic reported FACE criminal charges had been filed. Four clinics have buffer zones or injunctions.

***Texas***

Only two out of seventeen Texas clinics experienced blockades. Four clinics reported invasions. Three received bomb threats. Four clinics were vandalized. Five clinics reported home picketing. Death threats were received by two clinics. One clinic reported gunfire. Two clinics said staff quit as a result of clinic violence. Three clinics reported FACE violations. Eight clinics are protected by buffer zones or injunctions.

***Wisconsin***

One clinic in Wisconsin was invaded, and one received a bomb threat. Four of the five clinics were vandalized. Three clinics reported home picketing. Three clinics said staff members had been stalked. Three clinics reported death threats. FACE violations were reported at two clinics. One clinic reported FACE criminal charges have been filed. Four clinics have buffer zones or injunctions.

MAY 17 1996
CLERK

(21)

No. 95-1065

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS, *et al.*,
*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN
NEW YORK, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# BRIEF OF *AMICUS CURIAE* FAMILY RESEARCH COUNCIL URGING REVERSAL

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19 pp

## QUESTION PRESENTED

Should people going to or coming from an abortion clinic be classified as a "captive audience" in order to save an otherwise unconstitutional prior restraint on speech in a classic public forum?

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## INTEREST OF THE *AMICUS CURIAE*[*]

**Family Research Council, Inc.** is a voice for the pro-family movement in Washington, D.C. Family Research Council is a non-partisan, non-profit organization dedicated to the preservation and defense of the family and committed to work as an advocate for the family to all branches of government. The Family Research Council believes in the sanctity of life from the moment of conception until natural death.

## STATEMENT OF THE CASE

Family Research Council incorporates by reference the facts set forth in petitioners' brief on the merits.

## SUMMARY OF THE ARGUMENT

The "Captive Audience" doctrine does not apply to the present case because respondents' interests in privacy do not outweigh the right of petitioners and others to free speech in a traditional public forum.

Respondents do not have a reasonable expectation of substantial privacy in public areas around abortion clinics, and therefore they cannot ask the government to silence speakers on their behalf. Where the expectation of privacy is not reasonable, as is likely when the listener is in public, the "captive audience" doctrine should not apply.

Still, even if respondents did have some privacy interest in this classic public forum, they have the means to

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[*] This brief was submitted with the written consent of the parties, filed with the clerk of this Court.

avoid further unwanted speech, and the imposition on their privacy is, therefore, not substantial. Where, as here, infringement on privacy is only incidental, the captive audience doctrine will not override the rights of the speaker to free speech.

The *Madsen* opinion deferred to the findings of the Florida court on governmental interest, and did not adopt the state court's views on captive audience or medical privacy for its decision. Therefore, *Madsen* does not control the outcome of this case.

## LAW AND ARGUMENT

### I. INTRODUCTION

"To many, the immediate consequence of [the] freedom [to speak] may often appear to be only verbal tumult, discord . . . in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve." *Cohen v. California*, 403 U.S. 15, 24-5 (1975).

The First Amendment Freedom of Speech Clause guarantees more than simple communication of ideas by speakers. It also protects those persons on the other end of communication, the listener. The listener has a right under the First Amendment to receive information and a right not-to-listen, and, in narrow circumstances, he also has a constitutional right of privacy to be left alone. *See Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 466 (1952) (Black, J., dissenting in part); *id.* at 467-69 (Douglas, J., dissenting); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); and *Rowan v. Post Office Dept.*, 397 U.S. 728, 736 (1970).



The interests of both speaker and listener are so fundamental to a free society and the concept of ordered liberty, that neither interest automatically overrides the other. Courts must take care when these interests come into potential conflict and are placed in the scales to be weighed against each other. Depending upon the totality of the circumstances, sometimes the right of the speaker to proclaim his message will prevail over the interests of the listener, other times, the right of the listener to be left alone will require the speaker to refrain from speaking to that listener.

### A. THE CONSTITUTIONALITY OF AN INJUNCTION REQUIRES A FACT-INTENSIVE ANALYSIS; THE FACTUAL RECORD HERE IS SLIM.

Since this case involves the propriety and constitutionality of an injunction, the facts and the record are very important to its resolution.

The District Court below paints with a broad brush in making its "findings." These findings appear to be neither evidentiary nor factual in nature, as is required to justify such an injunction and to permit an intelligent appellate review. Instead, the District Court submits opinion, conclusion, and editorial comment as fact. Nowhere does the District Court point to specific, individual acts of the petitioners, nor does the court explain what the supposed "harassment" was, or how sidewalk counseling, peaceably conducted, constituted "intimidation." Apparently, the conduct of pro-life demonstrators is in some way wrongful merely because their speech is in opposition to abortion. *See generally Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992).

The Circuit Court is equally vague in its recitation of the factual record. As the dissent in the *en banc* decision

below noted, when the record is this inadequate, there can be no justification for upholding the injunction.

> Such ambiguous statements, however, hardly prove adequate to assure the 'precision of regulation' demanded by *Madsen*. . . . [and] no constitutional freedom, least of all the guarantees of the Bill of Rights, [may] be defeated by insubstantial findings of fact screening reality.

*Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, at 402-03 (2d Cir. 1995) (Meskill, J., dissenting).

### B. RESPONDENTS BEAR THE BURDEN OF OVERCOMING THE HEAVY PRESUMPTION AGAINST VALIDITY OF PRIOR RESTRAINT OF PETITIONER'S SPEECH IN PUBLIC.

Respondents bear the burden of overcoming a heavy presumption against the constitutionality of their injunction's prior restraint on speech in public. When reviewing an injunction prohibiting peaceful leafleting which criticized the business practices of the respondent, the Court recognized the paramount importance of free speech by striking the injunction. *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971). While weighing the intrusion into the privacy of the respondent against First Amendment concerns, the Court stated that:

> Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity. Respondent thus carries a heavy burden of showing justification



> for the imposition of such a restraint. . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature . . . The right of privacy involved in [*Rowan*] is not shown here.

*Id.* at 419-20.

This Court continued to affirm the weighty presumption against prior restraint of public speech in subsequent cases. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975), for example, the Court stated that "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." And in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 534 (1980) (internal citations and quotations omitted):

> The First and Fourteenth Amendments remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.

### C. RESPONDENTS DID NOT RAISE THE CAPTIVE AUDIENCE DOCTRINE BELOW; THIS COURT SHOULD NOT RELY ON AN UNASSERTED CLAIM TO SAVE THE OFFENSIVE SPEECH BAN.

This case involves a dispute between private litigants. The provisions at issue are not statutory provisions advancing a government interest. Consequently, the only government involvement is adjudication and the only government interest is the protection in equity of asserted interests of the parties. It is well-established that courts may grant only the relief prayed for and consider only those interests actually asserted by the parties. In doing so, courts will not go outside the pleadings to justify relief given.

Here, respondents did not assert in their pleadings, original or as amended, *any* First Amendment interests, either as a right not-to-listen in privacy, or otherwise.[1] Since respondents apparently make their claim of being a captive audience only here on appeal, it should not be considered as a justification for the injunction. Neither should respondents' right to be left alone be considered as a government interest to be balanced against the fundamental First Amendment

[1] The District Court stated in its opinion, *Pro-Choice Network*, 799 F. Supp. at 1422, that respondents made seven claims in this case, involving: (1) equal protection, privileges and immunities of national citizenship, right to interstate travel, and right to abortion under a 42 U.S.C. § 1985(3) claim (which were all later dismissed by 828 F. Supp. 1018 (W.D.N.Y. 1993)); and (2) six causes of action under state statutory and common law. No First Amendment privacy right to be left alone and not to be captive to petitioners' messages were pleaded.



speech interests of pro-life advocates or as any defense to this oppressive injunction.

## II. THE "CAPTIVE AUDIENCE" DOCTRINE DOES NOT APPLY TO THE FACTS OF THIS CASE.

This Court has instructed that the "captive audience" doctrine may save on otherwise invalid prior restrain only when the audience has a reasonable expectation of substantial privacy and that privacy interest is substantially violated.

Where the expectation of privacy is not reasonable, as is likely when the listener is in public, the "captive audience" doctrine should not apply. Where the expectation is reasonable, but the privacy interest is less than compelling, the "captive audience" doctrine will not outweigh the speaker's right to free speech. Similarly, where there is a reasonable expectation of substantial privacy, but the infringement on the privacy is only incidental and not pervasive, the doctrine will not override the rights of the speaker. Only when the imposition on substantial listener privacy is so unduly burdensome as to be "intolerable" will the unwilling listener's First Amendment rights overcome the speaker's rights. *Cohen*, 403 U.S. at 21.[2]

[2] The "captive audience" doctrine encompasses the concept that the government may regulate speech delivered to an "unwilling listener." Marcy Strauss, *Redefining the Captive Audience Doctrine*, 13 Hastings Const.L.Q. 85 (1991). Application of the "captive audience" doctrine results in an ad hoc balancing of the "privacy" rights of an unwilling listener with the free speech rights of the proponent. This balancing test has resulted in the weakening of free speech protection. The use and expansion of the 'captive audience" doctrine "under current levels of scrutiny is lessening the protection the First Amendment previously provided to street preaching." Patrick J. Flynn, *Street Preachers Versus*

"The mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Cohen*, 403 U.S. at 21 (citing *Keefe*). The "captive audience" doctrine may only be invoked to sustain an otherwise unconstitutional prior restraint when a substantial privacy interest is being invaded in an essentially intolerable manner. *See Cohen; Rowan; Consolidated Edison.* In *Cohen v. California*, for instance, Mr. Cohen had been convicted of disturbing the peace based on offensive conduct for wearing a jacket with the inscription "F--- the Draft" inside a courthouse. In reversing his conviction, the Supreme Court stated:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority of silence dissidents simply as a matter of personal predilections.

*Id.* at 21.

Like the listeners inside the courtroom in *Cohen*, respondents have no reasonable expectation of substantial privacy in public areas around abortion clinics.

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*Merchants: Will the first Amendment Be Held Captive in the Balance?*, 14 St. Louis U.Pub.L.Rev. 613, 617 (1995).



## A. RESPONDENTS HAVE NO REASONABLE EXPECTATION OF SUBSTANTIAL PRIVACY IN PUBLIC AREAS AROUND ABORTIONS CLINICS.

### 1. Right To Substantial Privacy Exists In The Home, But Is Not Absolute.

The most compelling cases supporting expectations of privacy for the captive audience doctrine involve the listener in the home. "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey v. Brown*, 447 U.S. 455, 471 (1980)(equal protection challenge to residential picketing); *see also Frisby v. Schultz*, 487 U.S. 474 (1988)(picketing of a residence); *Rowan*, 397 U.S. 728 (reception of mail at home).[3]

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[3] In *Gregory v. Chicago*, Justice Black eloquently discussed the value that is placed upon private area such as the home.

> If anyone with a complaint [had] the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. . . . [H]omes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. . . . I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected . . . from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.

394 U.S. 111, 125 (1969).

Yet, the "sanctity" of the home is not absolute. Where the privacy interest is not substantially violated, or where the listener can avoid the speech, the rights of the speaker will prevail. For instance, in *Martin v. Struthers*, 319 U.S. 141 (1943), this Court struck down an ordinance which forbade any person to knock on doors, ring doorbells, or otherwise summon a resident to the door for the purpose of receiving handbills on the grounds that the invasion of privacy was slight. In *Consolidated Edison*, 447 U.S. at 547, the Court noted that the unwilling recipient of objectionable mail in the home can substantially avoid the speech and "escape exposure to [sic] objectional material simply by transferring [it] from [his hand] to the wastebasket."

These cases make clear that, even in the home, the citadel of the sick and weary, unwilling listeners may be made to endure these minor infringements on their privacy in the interests of others' paramount First Amendment rights to speak.

### 2. Outside the Home, the Right of Privacy of an Unwilling Listener is Sharply Limited.

An expectation of considerable privacy in public is rarely reasonable. Public and private are opposites; they cannot logically co-exist.[4]

Some limited fora exist in which listeners receive less privacy protection than in the home, but greater protection than in a public forum. City transit vehicles, for instance, are afforded a lesser degree of privacy than that found in the home, greater privacy interest than in public fora, such as

[4] An examination of the privacy rights of a public listener involves both the expectation of privacy and the inability to avoid exposure to speech in public. The latter will be discussed *infra* at section B.1.



parks or streets. *Lehman*, 418 U.S. at 303. In addressing the privacy interest in a courthouse, the Court in *Cohen* suggested that "it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park." *Cohen*, 403 U.S. at 21.

In a public forum, however, one's privacy interest is at its lowest. The Court in *Frisby* clearly pronounced this proposition by holding that "in many locations, we expect individuals simply to avoid speech they do not want to hear." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). Likewise, the *Cohen* Court acknowledged that "we have . . . consistently stressed that we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Cohen*, 403 U.S. at 21.

The Supreme Court has clearly separated the important privacy interest of a "captive audience" within the home and the importance of free speech protection in a public forum. This is evident by the statements in *Erznoznik*, that "the limited privacy interest of persons on the public streets cannot justify [] censorship of otherwise protected speech . . ." *Erznoznik*, 422 U.S. at 212.[5]

Clearly, the potential offensiveness of speech has no bearing on the nature of the public listener's privacy right. In *Keefe*, 402 U.S. at 419, for instance, the Court stated that the respondents' "practices were offensive to [the petitioners], as the views and practices of petitioners are no doubt offensive

[5] "It is almost incongruous to discuss privacy in the context of public places. Privacy interests are matched by the corresponding rights of every other individual in the public. If allowed to fully exercise these rights, some individual would veto every other individual's actions." Flynn, at 648.

to others. But so long as the means are peaceful, the communication need not meet standards of acceptance."[6]

In *Erznoznik*, 422 U.S. at 210, the Court held that "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."

A person does retain a reasonable expectation of privacy in his person. He has a right to personal safety and one protects him from assault, threats, and bodily harm. History, tradition, and the common law all agree that he has a privacy right of self-defense for those who invade his "personal space" and any zone of privacy about his person. But that zone of privacy most certainly does not extend 15 feet.[7]

Put simply, "privacy" in public is not to be expected. According to the Court in *Cohen*,

[6] "[T]here must be no restriction on uninvited communications on the ground that either the content of the message or the manner of its expression may be offensive to some persons upon whose eyes or ears it may fall." Franklyn S. Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 Nw.U.L.Rev. 153, 197 (1972).

[7] Cases involving protection of an individual's zone of privacy are prevalent. The most familiar of these kinds of cases is the no-contact protective order issued in domestic violence cases. With this type of restraining order, a defendant is prohibited any contact whatsoever with the plaintiff, occasionally with the requirement that the defendant stay a specified distance from plaintiff, such as 300 feet. But to justify this extreme type of restraint, there must be a long history of repeated wrongful or threatening behavior of a specific defendant against a specific plaintiff.



> While this Court has recognized that government may properly act in many situations to prohibit intrusions into the privacy of this home of unwelcome views an ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that *we are often captives outside the sanctuary of the home and subject to the objectionable speech.*

*Cohen*, 403 U.S. at 21 (emphasis added). In examining the reach of privacy interests into the public arena, the Supreme Court in *Kovacs v. Cooper*, 366 U.S. 77, 86-7 (1949), upheld a regulation prohibiting sound trucks or any vehicles with amplifiers emitting loud and raucous noises from broadcasting while on the city streets, stating:

> The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.[8]

[8] The Court was also careful to distinguish the interference created by amplification devices attached to vehicles from other free speech activities by stating that, "There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Id.* at 89.

### 3. *Madsen's* "Medical Privacy" Is Not Applicable to This Case.

Of great importance to this case is the way in which *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) will be applied to this and future cases of abortion clinic protest. The Court in *Madsen* analogized residential privacy to "medical privacy" in upholding the injunction. Yet, the Court was discussing the Florida Supreme Court's application of the strong interest of the State in residential privacy as analogous to that of the medical privacy.[9] Importantly, the *Madsen* opinion does not stand for the proposition that women going to abortion clinics necessarily have a "medical privacy" right which is, *per se*, equal to a residential privacy right. Rather, the *Madsen* case simply held that the "combination of governmental interests" -- including, *inter alia*, regulating non-speech, discussed *infra* -- justify the injunction. The *Madsen* injunction differs in significant respects from the *Schenck* injunction, as do the facts in both cases. Because a determination of the constitutionality of an injunction requires heavy reliance on the facts, these differences are compelling and dispositive.

[9] "The [Florida] court observed that while targeted picketing of the home threatens the psychological well-being of the 'captive' residence, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." *Id.* At 2526.



## B. EVEN IF RESPONDENTS HAVE A SUBSTANTIAL PRIVACY INTEREST IN PUBLIC AREAS AROUND ABORTION CLINICS, THEY CANNOT BE A CAPTIVE AUDIENCE BECAUSE THEY HAVE READY MEANS OF "ESCAPE" AND PETITIONERS' SPEECH IS NOT "INTOLERABLE."

### 1. The Government Cannot Prohibit Speech To Further Privacy Interests If The Unwilling Listener Can Avoid Exposure.

Only in very rare and special circumstances can a claim of captivity, as in *Lehman*, or an extended zone of privacy withstand constitutional scrutiny.[10] *Lehman*-type captivity requires a finding that all practical avenues of escape be foreclosed. There are few, if any, other instances of this kind of captivity in public.

The Supreme Court has clearly required the listener to take steps to avoid the unwanted speech before any government limitation on the speaker may be enforced. In

[10] Interestingly, the Court in *Lehman* cited to Justice Douglas' dissent in *Public Utilities Comm'n v. Pollack*, 343 U.S. 451 (1952), in support of its decision. In *Pollack*, the Court faced a challenge brought against the government's practice of playing radio programs over loudspeakers located on public passenger vehicles. While holding that there was no infringement on the commuters' constitutional privacy rights, the Court stated that: "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. *Id.* at 464. In *Lehman*, the Court had now extended the "captive audience" doctrine beyond the limits of the home, which increased the "weight" of this doctrine when balanced against free speech rights.

striking down a restriction prohibiting a drive-in theater from showing films containing nudity when the screen was visible from the street, the Court stated that "[s]uch selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. Jacksonville*, 422 U.S. at 209. The Court in *Erznoznik* recognized that the "offended viewer readily can avert his eyes" and the screen is "not so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Id.* at 212.

In *Consolidated Edison*, 447 U.S. 530 (1980), the Public Service Commission was attempting to silence a viewpoint based on the privacy interests of the "captive audience." *Id.* at 541. The Court responded to this argument by stating that "the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." *Id.* at 541-42.[11]

Even in cases involving the heightened privacy interest in the home, the Court has required the homeowner to take steps to avoid unwanted mail. (*See Consolidated Edison*, 447 U.S. 530; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).) The Court astutely recognized that the private homeowner had the constitutional authority to restrict unwanted information, but the government did not. In fact, the Court in *Rowan* stated that it had previously "acknowledged a limitation in terms of leaving with the homeowner himself the power to decide whether distributors of literature may lawfully call a home." *Rowan*, 397 U.S. at 736.

[11] "Rarely, of ever, is anyone truly captive; there is almost always some alternative means the unwilling iistener can take to avoid the message." Strauss, at 86.



The Court in *Frisby v. Schultz*, 487 U.S. 474, upheld a content-neutral ordinance prohibiting picketing in front of a residence against a First Amendment challenge brought by individuals who were picketing outside a doctor's residence who performed abortions. The Court reaffirmed the long-standing principle that public streets are traditional public fora, but tipped the balance in favor of the significant government interest of protecting residential privacy. *Id.* at 484. In defense of the restriction on the free speech of the picketers, the *Frisby* Court stated that:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. . . . The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.

*Id.* at 487 (internal citations omitted).

### 2. The Record Does Not Show That Persons Entering Or Leaving The Abortion Clinics Have No Means To Escape The Messages Of Petitioners.

Whether or not a person is to be considered a "captive audience" outside the home, for purposes of First Amendment analysis, is a mixed question of law and fact. While the District Court below concluded as a matter of law that persons entering and leaving clinics are captive to the

reception of a pro-life message, the record includes no evidence whatsoever that such persons are not reasonably able to avoid any unwanted communication. In addition, there is no evidence that anyone has been "captive" as that term is commonly understood: No one has been deprived of their personal liberty or unduly detained.

The record demonstrates that "there have been no physical 'blockades'" of clinic entrances and exits. *Pro-Choice Network*, 799 F. Supp. at 1424 n.5. The incidents were "usually peaceful in nature," *id.* at 1423; and clinic personnel, "patients," customers, and others were free to come and go as they pleased.[12]

The District Court found generally that "Project Rescue produces and distributes literature . . . engages in correspondence [and] seeks donations," *Pro-Choice Network*, 799 F. Supp. at 1423. At abortion clinics, there was picketing by pro-life demonstrators, congregating in or near driveways, noise-making, chanting, and yelling at persons entering and leaving the clinics. *Id.* at 1424.

There is no indication in the record that any patient was ever surrounded, entrapped, prevented from entering or exiting the clinics, or unable to leave the area. Additionally, there is no finding that sidewalk counselors forced persons to take pamphlets; the record does not show that they shoved pamphlets into the hands or pockets of people.[13]

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[12] At no time did the petitioners organize *en masse* sit-ins, lay down in entryways, link hands or chain themselves together, trespass on clinic premises, or make any other attempt to physically blockade clinic property in an effort to deprive women of their constitutional right to choose an abortion.

*Pro-Choice Network*, 67 F.3d at 401 (Meskill, J., dissenting).

[13] Occasionally, peaceful yet emotionally charged discourse would take place "in the compressed space at the entrances of the medical facilities." *Id.* at 1425. However, the court made no factual finding that these incidents were sufficient to find the patients to be a captive audience.



Instead, the lower court appears to make its finding on a very narrow ground, that "even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message," (*id.* at 1436), and because they have intended recipients of their message, which the court calls "targeting." *Id.* at 1425 and 1436. But there is no finding that patients were not able to avoid the communication after its initial reception. Unlike the audience in *Frisby*, the audience members have means to avoid unwanted speech by simply averting their eyes from any signs or placards, or walking passed or ignoring speech for the few seconds it takes to leave or enter the clinic.[14]

### C. *MADSEN* IS NOT DISPOSITIVE ON THE ISSUE OF CAPTIVE AUDIENCE.

Unfortunately, the *en banc* opinions of the Circuit Court confuse the issue by misstating this Court's decision in *Madsen*, 114 S.Ct. 2516. Both Judge Oakes and Judge Winter give the impression that *Madsen* stood for the proposition that women seeking abortions were captive.

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[14] According to Haiman at 177-78:

> People constantly "turn off" billboard and advertisements, not to mention the sounds of surrounding voices, often without blinking an eye or twitching an ear. Even in the realm of physical movement, one can avert his eyes as quickly from an offensive display sign as he can turn off an unwelcome radio or t.v. message. In neither example is one free to avoid the initial impact, but in both cases one is capable of shutting out, either physically or mentally, any communication beyond that.

Judge Oakes wrote,

> In *Madsen*, the Court acknowledged that . . . "while targeted picketing of the home threatens the psychological well-being of the 'captive' resident," the Court noted, "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance."

*Pro-Choice Network*, 67 F.3d at 392.

What Judge Oakes neglects to include in his quotation is that the Court in *Madsen* was merely reciting the Florida Supreme Court's characterization of the case; it was not necessarily adopting those views as its own. Placed into proper context, the *Madsen* Court actually stated, "The *Florida Supreme Court* concluded that numerous significant government interests are protected by the injunction. . . . the *court* observed that while targeted picketing of the home threatens the psychological well-being of the 'captive' resident. . . ." *Madsen*, 114 S.Ct. at 2526 (emphasis added). Properly understood, it is clear that this Court has not found women seeking abortion to be a captive audience.[15]

Even though the *Madsen* Court cited the "captive audience" of the clinic, this doctrine was only one of several interests which in combination justified portions of the injunction. The government interests which were identified in *Madsen* included promoting free flow of traffic on public

[15] It is undisputed, however, that this Court did, in *Casey*, *infra*, endorse the mandated provision, in the closed environment of a clinic office, to women seeking abortion of the same type of information that petitioners, sidewalk counselors, and other pro-life advocates wish to provide in the free and open forum of the public sidewalk.



streets and sidewalks, ensuring the public safety and order, protecting the property rights of all citizens, and protecting a woman's freedom to seek lawful medical or counseling services.

The "floating" bubble zone and the "case and desist" provisions in the *Schenck* injunction do not advance these specific government interests and are clear violations of *Madsen*. Once this "floating zone" and accompanying "cease and desist" provisions are applied beyond the immediate surroundings of the clinic, all of the prior government interests dissipate. For instance, if a counselor approached a would-be clinic patron in a public park, the injunction's cease and desist provision remains applicable, despite the absence of any of the above-cited government interests, such as the lack of free flow of traffic on public streets and sidewalks, protecting the property rights of all citizens, and protecting a woman's freedom to seek lawful medical or counseling services.

Regardless of the indirect acknowledgment of the "captive audience" doctrine, *Madsen* examined each provision of the injunction to determine if it "burdens more speech than necessary to accomplish its goal." *Id.* at 2526. The *Madsen* Court proceeded to strike four of the six provisions of the injunction, one of which was substantially similar to the "cease and desist" provision in *Schenck*. *Id.* at 2530.

The cease and desist provision in the *Schenck* injunction would fail even according to the express language found in *Madsen*. In striking a similar provision which prohibited petitioners from physically approaching any person seeking services of the clinic "unless such person

indicates a desire to communicate," the *Madsen* Court held that:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e.,"fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and eve outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

*Id.* at 2529 (internal citations and quotations omitted). The cease and desist provision in the *Schenck* injunction has the identical effect as the provision struck in *Madsen*, with the insignificant difference that in the present case, the counselors may first approach the clinic patrons before being dismissed. Additionally, the speech in this case does not rise to the level of being independently proscribable as threats or otherwise proscribable under the First Amendment, and therefore warranting such harsh treatment.



The admonition in *Madsen* that citizens must tolerate even outrageous speech to provide "adequate breathing space to the freedoms protected by the First Amendment" has been completely ignored in here. *See Madsen* at 2529. The *Schenck* injunction has asphyxiated the First Amendment to the extent that its underlying purpose of protecting unpopular speech is lifeless.

To further distinguish the injunction in *Madsen* from the *Schenck* injunction, the former was in response to a previous, more narrow, injunction which was found ineffective. The Court in *Madsen* clearly stated that:

> We also bear in mind the fact that the state court originally issued a much narrow injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order.

*Id.* at 2527. The *Schenck* injunction, which encompasses more speech than even the broader one in *Madsen*, was issued as the original response rather than resulting from an ineffective previous injunction. This realization should increase the examination in reviewing the injunction in *Schenck* because it was not issued in response to a prior ineffective injunction which was more narrow, but began as a broad injunction.

Furthermore, as compared to the present case, the activities in *Madsen* which were cited to justify portions of the final injunction, were much more egregious. In *Madsen*, the Court noted that the protesters were often using

loudspeakers. *Id.* at 2521. Such amplification devices were not used by the counselors in the present case.

Petitioners also stipulated that blocking or impeding access to the clinic may be enjoined. Conversely, in *Madsen*, the precise reason for upholding the 36-foot buffer zone was to "protect[] unfettered ingress and egress from the clinic, and ensuring that petitioners do not block traffic . . ." *Id.* at 2527. The *Madsen* Court further stated that the "need for a complete buffer zone near the clinic entrances and driveway may be debatable," but gave deference to lower court's familiarity with the background of the case because the full factual record was never certified as part of the record. *Id.* Even with the presence of more egregious conduct in *Madsen*, the Court hesitated when upholding the buffer zone around the clinic and driveways. *Id.*

### D. EVEN IF RESPONDENTS HAVE A SUBSTANTIAL PRIVACY INTEREST IN PUBLIC AREAS AROUND ABORTION CLINICS, THE POTENTIAL INFRINGEMENT OF THIS INTEREST IS NOT CONSIDERABLE OR INTOLERABLE.

Incidental burdens on an individual's privacy interests while in a public forum are an expected price of a free society.

It has been generally recognized that individuals can even be *made* to listen to things they do not want to hear, at least in those cases where the forced listening was not unduly burdensome. As the Court pointed out in *Rowan*, "we are often 'captives' outside the sanctuary of [places such as] the home and subject to objectionable speech." 397 U.S. at 738. That is the price one must necessarily pay to live in a society



with other people. This is particularly true in the rough-and-tumble world of politics and politically charged issues, such as abortion.

This case involves the stifling of pure speech. Although the court below was concerned with protecting people from alleged negative effects of emotive speech, the Supreme Court has specifically stated that:

> We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

*Cohen*, 403 U.S. at 26. The Court has also previously held that "[t]he emotive impact of speech on its audience is not a secondary effect" sufficient to allow proscription of protected speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Moreover, in *Org. For a Better Austin v. Keefe*, 402 U.S. at 419, the Court clearly stated that "the claim that the expressions were intended to exercise a coercive impact on respondents does not remove them from the reach of the First Amendment."

#### 1. There Are Many Examples Of Individuals Being Compelled To Listen To Messages They Might Otherwise Choose Not To Hear.

Children are compelled to attend schools and listen to their teachers. Sports fans are routinely compelled to listen to, and expected to pay respect to, the Star Spangled Banner,

and sometimes even the national anthem of a foreign nation, such as Canada. Motorists are compelled to read road signs and other forms of governmental speech. Taxpayers are compelled to read the communications published by federal and state governments. Employees find they are unable to avoid speech from government in health, safety, and other regulations.

The courts themselves are not immune from forcing speech upon unwilling listeners. Judicial process effectively makes it a crime for individuals to refuse to become jurors and be required to listen to judges, lawyers, and witnesses, not to mention the criminal defendant, without the right to avoid reception of these messages. Indeed, every admittee to a hospital is required by federal law to receive certain potentially offensive "messages" about their "rights" as a patient. *See* Omnibus Budget Reconciliation Act of 1990, Public Law 101-508 §§ 4206, 4751 (The Patient Self-Determination Act).[16]

Importantly, this Court has upheld state laws requiring that women seeking abortion be given certain state-mandated informed consent information about, *inter alia*, abortion, abortion alternatives, fetal development; the provision of such information was found not to violate the privacy rights of the woman or her doctor. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. __, 112 S.Ct. 2791, 2822-24, 120 L.Ed.2d 674 (1992). Furthermore, the *Casey* plurality noted that, a woman seeking abortion does not have "a right to be insulated from all others in doing so." *Id.* 112 S.Ct. at 2821.

If the privacy rights of the women in *Casey* are not unduly infringed by these messages from the state, certainly the privacy rights of people around an abortion clinic are not

[16] Ironically, these admitted hospital patients, especially those who are very ill, old, or helpless, are precisely the type of listeners who need the protection of a "captive audience" designation.



unduly infringed by messages from private citizens exercising their fundamental right to free speech on a public sidewalk.

### 2. Petitioners' Speech Is Potentially Beneficial.

Throughout the opinions of the lower courts, it seems to be almost taken-for-granted that respondents, by and large owners and operators of abortion clinics and their employees, speak for each and every woman entering their clinics. While the issue of whether or not the clinics have standing to assert or protect the interests of these women or of those seeking the services of the clinics is not presented here, it should, nevertheless, not be necessarily presumed.

Moreover, it would be unreasonable to believe that each woman that goes to an abortion clinic has irrevocably chosen to terminate her pregnancy by abortion and does not want and desire the viewpoints of others. Many pregnant women "seeking abortion" have not firmly made up their minds to go through with it. Many of them change their minds, often after their initial visit to the clinic. Sometimes they change their minds (and hearts) as a result of discussions with sidewalk counselors. Furthermore, operators of abortion clinics have more than "constitutional" concerns. There is clearly a financial motive for them to encourage women to enter their clinic. When pro-life demonstrators successfully persuade a woman to forego having an abortion, the clinics' interests in their pocketbooks suffer more than their interests in privacy. The inherent conflict-of-interest should not be lightly dismissed.

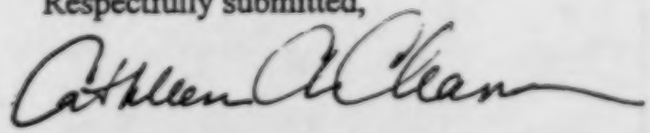
## III. CONCLUSION

Respondents are part of a social and cultural movement that holds supreme the right of women to choose to have abortions. Indeed, respondents' own names reveal the object of their advocacy -- "choice" is their very *raison d'être*. Yet, here, respondents urge the Court to ignore their name and disregard their cause, so that women entering abortion clinics can be seen as being there not by "choice," but by necessity. In a word, respondents want this Court to believe that the women are "captives."

There is a sad irony here. Petitioners and this *amicus* have long believed that women are enslaved by abortion. We have tried to show them that they have been misled by abortion activists and manipulated by the abortion industry. Yes, we too believe they are captives. And we shall continue, in whatever avenue is left to us, to try to reach them with the truth, and the prospect of freedom's fulfillment in truth.

The decision of the court below should be reversed.

Respectfully submitted,



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FILED
JUL 1 1996
CLERK

No. 96-268

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
*Petitioners,*

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

## BRIEF FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE NATIONAL ABORTION FEDERATION, AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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34 pp

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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No. 95-1065

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REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
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v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

**BRIEF FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE NATIONAL ABORTION FEDERATION, AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

---

## INTEREST OF *AMICI CURIAE*

The American College of Obstetricians and Gynecologists (ACOG), the National Abortion Federation (NAF), and Planned Parenthood Federation of America, Inc. (PPFA) submit this brief in support of Respondents.[1]

ACOG, founded in 1951, is a private, voluntary, not-for-profit organization of physicians who specialize in obstetric and gynecologic care. A leading group of pro-

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[1] The parties have consented to the filing of this brief, and their letters of consent are filed concurrently herewith.

fessionals providing health care to women, its more than 37,000 members represent approximately 90 percent of all obstetricians and gynecologists practicing in the United States.

NAF, a not-for-profit professional association, was founded in 1977 and is composed primarily of clinics and physicians' offices providing reproductive health services, including abortion. Currently, NAF members include over 300 abortion providers operating in 42 states, the District of Columbia, Puerto Rico, and Canada. NAF provides professional standards, guidelines, training, and education to its members and serves as a clearinghouse for information and advice to abortion service professionals and the general public.

PPFA, a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. Currently, PPFA has 152 affiliates in 49 states operating approximately 925 health centers. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion.

*Amici*, whose members and affiliates provide abortions and other medical treatment, have a strong and abiding interest that this Court be fully aware of the profoundly harmful consequences for medical patients and the provision of medical care that result from antiabortion harassment and intimidation outside of abortion clinics and other medical facilities. *Amici* themselves have obtained, and will continue in the future to seek, injunctive relief similar to that at issue in this case in an effort to lessen the often devastating impact of the protesters' conduct upon abortion and non-abortion patients alike, and upon the providers' ability to render care.

## STATEMENT OF FACTS

*Amici* adopt the Statement of the Case in the Brief for Respondents filed in this Court.



## SUMMARY OF ARGUMENT

In this case, as in myriad documented cases throughout the country, women seeking medical care, physicians providing that care, and staff at clinics and other medical facilities all have been the targets of extreme forms of antiabortion harassment and intimidation outside those buildings. This conduct of the protesters is wholly inimical to the provision of medical care. By crowding in extremely close proximity to women entering the facilities, and by shoving, pushing, gesticulating hysterically, and screaming angrily at such close range, the protesters jeopardize the health of the women seeking medical care, heighten their risks of suffering from medical complications, and place great stress upon medical providers, thereby impairing their ability to function optimally. The protesters' conduct harms not only abortion patients in this way, but also many non-abortion patients seeking reproductive health, obstetric, or other medical treatment.

*Amici* are dismayed at the utter absence from the Brief for Petitioners of any discussion of the medical consequences of the protesters' activities. Indeed, Petitioners evidently would have this Court treat the Respondent medical facilities as any "business facilit[ies]." Brief for Petitioners at 14. *Amici* sharply challenge this view, and instead argue that the health care dimensions of this case present a significant government interest which requires protections that would be unnecessary in other First Amendment cases involving different kinds of "business facilities."

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2525 (1994), this Court held that in order to comport with the First Amendment, a content-neutral injunction that restricts speech should "burden no more speech than necessary to serve a significant government interest." The buffer zone and "cease and desist" provisions of the injunction at issue place essential controls upon the protesters' injurious conduct, while only minimally and inci-

dentally impacting upon their speech. The provisions are critically necessary to serve the significant government interest in protecting women's health and access to medical care. Therefore, they satisfy the *Madsen* test.

Nevertheless, *amici* further respectfully urge this Court to reconsider whether the heightened scrutiny enunciated in *Madsen* is appropriate in this and similar cases. Specifically, *amici* argue that at least with regard to the particular injunction provisions at issue herein (and others like them), a more lenient First Amendment analysis should be applied. The entire purpose and virtually the entire effect of these two provisions is to regulate the *conduct* of the protesters that impedes access to the medical facilities and crowds and threatens people seeking access there. This regulation of harmful conduct has only a minimal and incidental impact upon speech since the protesters may still engage in the fullest panoply of bona fide speech activities, including picketing, pamphleting, sidewalk counseling, chanting, waving signs and images, praying, and shouting. *Amici* submit that where, as here, certain provisions of an injunction regulate nonspeech with only minimal and incidental impact on expression, under this Court's precedents a more lenient First Amendment analysis should be applied. A more relaxed standard is also appropriate in this case because the patients targeted by the protesters constitute an audience held captive by virtue of their medical circumstances —another factor that has historically justified heightened restrictions on expression. Therefore, whatever the merits of applying a more stringent review to other provisions of this or other injunctions, the particular provisions at issue herein should be tested more leniently.



## ARGUMENT

### I. THE PROVISIONS OF THE INJUNCTION AT ISSUE SATISFY THE *MADSEN* TEST BECAUSE THEY ARE NECESSARY TO SERVE THE SIGNIFICANT GOVERNMENT INTEREST IN RESTRICTING CONDUCT THAT HARMS PATIENTS AND IMPEDES THE PROVISION OF SAFE AND EFFECTIVE MEDICAL CARE

In *Madsen*, this Court approved the Florida Supreme Court's enunciation of several of the "significant government interests" sufficient to justify injunctive regulation. One of these significant government interests is the protection of "a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Madsen*, 114 S. Ct. at 2526. Another, albeit related, significant government interest is the protection of medical patients from the harms of targeted picketing: "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." *Id.* The provisions of the injunction at issue in this case, which burden speech only minimally and incidentally to their regulation of conduct (*see* discussion *infra* at 23-25), are absolutely necessary to serve these significant government interests.[2] Therefore, they satisfy the *Madsen* test.

The protesters' conduct in this case is fundamentally similar to that which has been documented in many other cases around the nation. It involves, as the district court found, hostile protesters crowding in large numbers in

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[2] Indeed, in crafting this injunction, the district court was "guided by the paramount need to maintain an atmosphere conducive to the health care functions" of the Respondent medical facilities. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1433 (W.D.N.Y. 1992), *aff'd en banc as modified sub nom. Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (Pet. App. A-168) ("Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari, filed December 27, 1995).

close proximity to clinic entrances, patients, and driveway entrances, swarming around cars and people trying to get into the facilities, and forcing patients to run an intimidating gauntlet of harassing, shoving, grabbing, crowding, and threatening conduct. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992) (Pet. App. A-146 to A-147). Protesters push video cameras right up into the patients' faces, intending to, and succeeding in, terrifying them. *Id.* at 1426 (Pet. App. A-151). Also, the so-called "sidewalk counselors" often "turn to harassing, badgering, intimidating and yelling. . . . [They] often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level." *Id.* at 1425 (Pet. App. A-148).

This type of conduct increases medical risks and causes harm not only to abortion patients but to many other patients as well. Like most abortion facilities, Respondent medical facilities and physicians all provide a full range of gynecological and family-planning health care services in addition to abortions. For example, Respondent Dr. Morris Wortman testified at the preliminary injunction trial that on Saturdays, when antiabortion conduct was expected at his medical office, at least 60 percent of his patients were non-abortion patients. Tr. 899.[3] Moreover, several of the Respondent medical facilities and physicians' offices are located in or next to full-service hospitals, or in medical office buildings that house numerous health care providers. The protesters thus disrupt the provision of many types of medical care, including obstetric care, nongynecologic surgery, and many other types of general medical care.[4]

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[3] Citations to the preliminary injunction trial transcript are designated herein as "Tr."

[4] In a 1989 study of nonhospital abortion facilities, 94% provided contraceptive care, 91% provided general gynecologic care, 88% provided sexually transmitted disease treatment, 64% provided infertility services, 60% provided HIV testing, 51% provided obstetric care, 45% provided general medical care, and 24% provided nongynecologic surgery to non-abortion patients. Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plan. Persp. 246, 247 Table 1 (1991).



Under ordinary conditions, an abortion is an extremely safe medical procedure.[5] Nevertheless, all medical procedures, particularly invasive procedures such as abortions, involve certain risks. An abortion carries with it a potential for serious complications,[6] including infections necessitating hospitalization, hemorrhage requiring transfusion, uterine perforation, bowel or bladder injury, pulmonary embolism, endotoxic shock, convulsions, cardiac arrest, and, in rare circumstances, death.[7] In addition, virtually all of the procedures performed on non-abortion patients by Respondents and neighboring providers carry a variety of medical risks as well, ranging from relatively minor risks to very serious, life-threatening ones. *See, e.g., Be Informed: Questions To Ask Your Doctor Before You Have Surgery*, U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, Pub. No. 95-0027, Jan. 1995, at 1 (all surgeries and alternative treatments carry risks).

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[5] A first-trimester abortion is safer than childbirth. *See, e.g., Safety of Abortion*, Fact Sheet, National Abortion Federation (1996).

[6] A 1985 article estimated that 5,000 women suffer a serious complication from abortions each year. *See* James W. Buehler, M.D. et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. & Gynec. 14, 14 (1985).

[7] Nancy J. Binkin, *Trends in Induced Legal Abortion, Morbidity and Mortality*, 13 Clin. Obstet. & Gynaec. 83, 92 (1986); Willard Cates, Jr. et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 267 n.† (1977); David A. Grimes, M.D. et al., *Prevention of Uterine Perforation During Curettage Abortion*, 251 JAMA 2108 (1984); *see also Safety of Abortion*, Fact Sheet, National Abortion Federation (1996).

For the reasons described below, the antiabortion conduct at issue increases the risk of these complications occurring; it could also result in the enhanced severity of any such complications. The protesters' conduct likewise substantially impairs the ability of doctors and other staff to provide effective services, and creates an array of other potentially serious risks to all women seeking medical services at these facilities.[8]

### A. The Protesters' Conduct Harms Patients By Causing Them To Delay Seeking Treatment And Follow-Up Care

In many cases, the conduct of the protesters so terrifies and intimidates patients that it deters them from entering the medical facilities on the days of their appointments, thereby forcing them to postpone or altogether abandon their abortions or other medical care. *See, e.g., Pro-Choice Network*, 799 F. Supp. at 1424, 1427 (Pet. App. A-147, A-153 to A-154).[9] By causing this delay, the protesters place abortion patients and others at greater risk of suffering the kinds of complications described above. With respect to abortions, it is widely recognized that "[t]he earlier in gestation that a woman has an abortion, the safer it is for her medically. . . . The risk of the procedure and the potential for complications increase with the length of pregnancy." *Medical and Psychological Effects of Abortion on Women*, Final Draft of Surgeon General's Report 13 (1989). Indeed, studies indicate "that *any* delay increases the risk of complications." Willard Cates, Jr. et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 268 (1977) (emphasis in original).[10]

Likewise, delay in seeking treatment is highly likely to be harmful to many non-abortion patients as well. For example, "[a] postponed pap smear or breast examination can result in delayed detection of pre-cancerous cells or a lump causing serious and unnecessary health risks to the patient." *Violence at Women's Health Clinics: Hearing Before Subcomm. on Labor, Health and Human Services, and Education, and Related Agencies of the Senate Comm. on Appropriations*, 104th Cong., 1st Sess. (1995) (here-

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[8] *Amici* note that the protesters specifically intend to bring about these medical consequences. *See, e.g.*, Joseph M. Scheidler, *Closed: 99 Ways to Stop Abortion* 74, 76 (1985):

> [I]t is important for us to know that when pro-life pickets are outside a clinic, complications and confusion inside the clinic increase by as much as 400 percent. . . .
>
> . . . .
>
> Consider that if our presence at clinics causes four times more confusion and complications than there would be if we were not there, then it is obvious that we should be there every time they operate. . . .
>
> . . . The only way to avoid complications is to avoid abortions.

*See also Violence at Women's Health Clinics: Hearing Before Subcomm. on Labor, Health and Human Services, and Education, and Related Agencies of the Senate Comm. on Appropriations*, 104th Cong., 1st Sess. (1995) (hereinafter "*Specter Hearing*"), at 74 (statements of Kay Arndorfer, Acting Executive Director, and Donna L. Singletary, Director, Government Relations, National Abortion Federation), 76-81 (discussing excerpts from *The Army of God Manual* put out by an antiabortion underground group as a how-to manual for disrupting abortions).

[9] *See also Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 668-69 (Fla. 1993) (per curiam), *aff'd in part and rev'd in part sub nom. Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991).

[10] *See also* James W. Buehler, M.D. et al., *supra* note 6, at 14 ("advanced gestational age is recognized as a major risk factor for serious complications following abortion"); Janet O'Keeffe & James M. Jones, *Easing Restrictions on Minors' Abortion Rights*, 7 Issues in Science & Tech. 74, 79 (1990) ("Any delay in having an abortion increases the risks to a woman's health . . . ."); Jocelyn A. Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Brit. J. Clin. Psychol. 29, 37 (1982) ("medical complications increase with gestation").

inafter "*Specter Hearing*"), at 57 (statement of Kate Michelman, President, National Abortion and Reproductive Rights Action League); *see also* testimony of Marilynn Buckham, Tr. 507-08 (protesters caused increased problems for asthmatic patient).

The protesters' conduct also causes patients who do succeed in entering the facilities on the days of their appointments to delay or even avoid altogether their follow-up appointments. *See, e.g.*, testimony of Dr. Wortman, Tr. 901-02. Forgoing or delaying post-procedure follow-up appointments enhances the risk of complications. *See, e.g., Abortion and Sterilization: Medical and Social Aspects* 267 (Jane E. Hodgson ed., 1981) ("post-abortion complications and unnecessary laparotomies could be avoided with better follow-up care"). As the district court found, one of the most disturbing examples of this phenomenon has occurred when abortion patients who have undergone insertion of a cervical dilation device known as a laminaria fail to return to the clinic to have it removed within the medically required time, thereby risking serious infection, sterility, hemorrhage, or emergency hospitalization. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-153); *see also* testimony of Susan Ward, Tr. 612-13; *NOW v. Operation Rescue*, 747 F. Supp. 760, 764 (D.D.C. 1990), *aff'd in part, remanded in part*, 37 F.3d 646 (D.C. Cir. 1994).

### B. The Protesters' Conduct Causes Patients To Suffer From Extreme Stress, Which In Turn Increases Medical Risks

The record in this and other cases, along with medical and social scientific literature, demonstrates that the conduct at issue often causes patients to suffer extreme emotional and psychological stress, which in turn can complicate procedures and increase risks. Indeed, it is generally accepted that in the medical context there is a particular



need for calm and quiet, and that harassment and stress are inimical to the provision of medical care:

> " 'Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.' "

*Madsen*, 114 S. Ct. at 2528 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 (1979), and *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment)).

The increased stress and anxiety inflicted upon patients by the protesters' conduct can hardly be overstated. Patients who are forced to experience it usually are "visibly shaken and severely distressed"; the use of video cameras at close range often makes them "hysterical or severely upset." *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-152 to A-153). Not only do they exhibit the expected reactions such as demonstrable fright and crying, they also exhibit "evidence of adrenergic 'fight-or-flight' reaction such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention." Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations*, 12 Population and Environment 379, 380 (1991) (hereinafter "*Proxemics*").[11]

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[11] *See also American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 613 F. Supp. 656, 663 (E.D. Pa. 1985) (patients entering clinic during protest "were visibly upset and distressed"); Jacqueline D. Forrest & Stanley K. Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plan. Persp. 9, 13 (1987) (for women who encounter harassing protests, "obtaining an abortion can be a frightening experience"); Barbara Radford & Gina Shaw, *Antiabortion Violence: Causes and Effects*,

Social science literature confirms that the invasion of personal space creates stress and, indeed, that the level of stress is directly proportionate to the distance between people:

> "A close interpersonal approach by a stranger in a public setting is stressful. Interpersonal space is something that we need in order to protect ourselves. . . .
>
> As people approach more closely, . . . [there is] increased eye contact . . . [one is] able to see facial expressions. . . . [One is] able to detect the possibility of aggressive posturing. At close interpersonal distances, the effect [is] magnified. [The] stress reaction is proportionate. . . . [A]s distance lessens between people, stress increases."

*Proxemics* at 384 (citation omitted). Indeed, the research literature consistently demonstrates that when strangers intrude on personal boundaries, "discomfort, physiological arousal, [and] flight reactions" occur; "the closer a stranger . . . comes, the more uncomfortable the situation." Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* 93 (1975).[12] In the health care context, an adequate distance between people is particularly important in protecting patients:

> "Health and medical [problems] are matters that most Americans would describe as being . . . of great privacy. Even in medical schools, nurses, doctors,

3 Women's Health Inst. 144, 149 (1993) (hereinafter "Radford & Shaw") ("militant antiabortion activism . . . has caused untold trauma").

[12] *See also* Rhonda Frankel-Fein, *Defense Style, Social Support Appraisal, Response to a Counseling Session, and Stress Perception in Women Undergoing Abortion* 3 (1991) (Ph.D. dissertation, New York University) (feeling threatened increases an individual's anxiety level, which can include physiological reaction) (citing E.S. Katkin, *Relationship Between Manifest Anxiety and Two Indices of Autonomic Response to Stress*, 2 J. Personality & Social Psychol. (1965)).



> and interns are instructed in order to be more sensitive to the distance adopted [in providing health care]."

*Proxemics* at 385 (citation omitted); *see also* testimony of Dr. Alice Hoagland, an expert in behavioral medicine and social impact theory, Tr. 739-41, 743-45, 748-51 (an unwanted, threatening stranger who approaches a patient seeking medical care causes numerous physiological stress reactions).

The level of heightened stress caused by the protesters' conduct is particularly problematic in this context because it is imposed upon patients who are already undergoing the pre-existing stress of an unwanted pregnancy or other medical problem, and impending treatment or surgery. *See, e.g., Pro-Choice Network*, 799 F. Supp. at 1427, 1428 (Pet. App. A-152, A-156). Even under the best of circumstances, abortions, along with other gynecological procedures, often evoke considerable anxiety. *See, e.g.*, Marianne Quinn, *Decision Making By Single Women Seeking Abortion*, 8 J. Nurses Soc'y of NZ 4, 5 (1980) (ordinary factors that cause stress in women seeking an abortion include visiting doctors and getting to the clinic, financial matters, and difficulties associated with confiding in others). The termination of an unwanted pregnancy in particular is known to be an especially stressful life event.[13] Many women approach abortion, like any other

[13] *E.g.*, Nancy E. Adler et al., *Psychological Factors in Abortion*, Am. Psychologist 1194, 1197 (Oct. 1992); Uta Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. & Gynaec. 33, 36 (1986); Rhonda Frankel-Fein, *supra* note 12, at 4; Glenda C. Polk-Walker, *Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion*, 28 Nursing Forum 22, 22 (1993); Marianne Quinn, *Decision Making By Single Women Seeking Abortion*, 8 J. Nurses Soc'y of NZ 4, 5 (1980); Tomas J. Silber, M.D., *Ethical and Legal Issues Relating to Abortion in Adolescence*, 18 Pediatric Annals 231 (1989); Margaret Cotroneo & Barbara R. Krasner, *A Study of Abortion and Problems in Decision-Making*, J. Marriage & Fam. Counseling 69, 70 (Jan. 1977).

invasive procedure, with trepidation because it "is a medical procedure which may be uncomfortable or painful." Uta Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. & Gynaec. 33, 36 (1986).[14] In addition, for most patients in general, even a minor surgical procedure can be "an important problem of emotional stress." Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688, 694 (1987). For most patients, the mere prospect of administration of anesthesia is associated with an increase in stress. *See, e.g.*, Joseph M. Garfield, M.D., *Psychologic Problems in Anesthesia*, 10 Am. Fam. Physician 60, 62 (1974).

Exacerbated enormously by direct exposure to anti-abortion harassment, these heightened anxieties can, in turn, cause any of a number of serious health problems for patients. Agitation can lead to major complications that would otherwise be extremely unlikely. *Proxemics* at 381. Stress and anxiety can cause elevated blood pressure and hyperventilation. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-152). They can also cause aggravation of asthmatic or morning sickness conditions. Hyperventilation may lead to "muscle spasms, circumoral numbness, and numbness and tingling of the fingers" and may "even lead to loss of consciousness" under certain circumstances. *Proxemics* at 381. Urinary retention brought on by stress can make it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in pre-operative evaluations. *Id.* at 380-81. Patients under extreme stress generally show more resistance to analgesics and require sedation, or

[14] *See also* Jocelyn A. Handy, *supra* note 10, at 37; Nancy Wells, *Pain and Distress During Abortion*, 12 Health Care for Women Int'l 293, 301 (1991) ("first-trimester abortion was related to a significant level of pain").



higher than usual doses of sedation, which increase surgical risks.[15]

Some patients are so distressed by the protesters' conduct that they are unable to lie still on the operating table, causing obvious risks and possibly making performance of the procedure impossible. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-153). Indeed, one of the main dangers described by witnesses at the preliminary injunction trial is that agitated patients tend to thrash around on the operating table, causing a risk that the sharp instruments used during the medical procedures may cause perforations. *See, e.g.*, Tr. 506-08 (patients agitated and unable to relax because of the demonstrators, increasing risk of danger from sharp instruments); Tr. 615-16 (danger of harm from instruments if patients move around); Tr. 821 (patients' thrashing increases risks).

Stress generally increases the level of pain experienced and the difficulty of performing any medical procedure.[16] In one study, patients suffering from greater stress before an elective inguinal hernia repair operation—a relatively standard surgical procedure—experienced more complica-

[15] *See* Warren M. Hern, *Abortion Practice* 35-37 (1984) (general anesthesia is associated with a two- to four-fold increase in first-trimester abortion fatalities, and significant increases in uterine perforation, cervical injury, blood transfusions, cervieal suture, and corrective major surgery); Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688, 688 (1987) (in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anesthesia, "[i]mportant factors are fear, anxiety and stress").

[16] *E.g.*, Robin C. Kay, *Psychological Preparation for a Potentially Stressful Medical Procedure* 32 (1984) (Ph.D. dissertation, Fordham University); Fredric M. Levine et al., *Failure Hurts: The Effects of Stress Due to Difficult Tasks and Failure Feedback on Pain Report*, 54 Pain 335, 336 (1993); Anne Manyande et al., *Anxiety and Endocrine Responses to Surgery: Paradoxical Effects of Preoperative Relaxation Training*, 54 Psychosomatic Medicine 275, 283 (1992).

tions following surgery, had poorer surgical outcomes, and used three times or more the amount of narcotics following surgery than did other patients.[17] There also were some indications in this study that the stressed patients were more susceptible to infectious diseases and needed a greater recovery period from these infections.[18]

### C. The Protesters' Conduct Causes Physicians And Other Medical Staff To Suffer Stress Which Impairs Their Ability To Provide Care

Physicians and other medical staff are also affected by the protesters' conduct, ultimately to the patients' detriment. Employee levels of distress are highly correlated with protest activity. *See, e.g.*, Glenna Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion Facilities Are Coping with Antiabortion Harassment* (1990) (Ph.D. dissertation, The Fielding Institute) (study investigating abortion clinic workers' methods for coping with stress associated with antiabortion harassment); Tr. 518.[19] The most obvious and dramatic result of this stress occurs when physicians are forced out of practice and staff leave their positions of employment. *See, e.g.*, Tr. 520-23.[20] However, even

[17] Bernard S. Linn, M.D. et al., *Effects of Psychophysical Stress on Surgical Outcome*, 50 Psychosomatic Medicine 230 (1988).

[18] *Id.* at 241.

[19] *See also* Radford & Shaw, *supra* note 11, at 148 (" 'Employees of facilities subjected to extreme levels of antiabortion activity were likely to feel violated and vulnerable, to experience a sense of disruption in their daily lives, and to have their confidence in the community undermined'. . . .") (citation omitted).

[20] *See also* Jacqueline D. Forrest & Stanley K. Henshaw, *Providing Controversial Health Care: Abortion Services Since 1973*, 3 Women's Health Inst. 152, 155 (1993) ("Since 1988, harassment by antiabortion activists may have become a more prominent reason for physicians and other health care providers to avoid performing abortions."); Radford & Shaw, *supra* note 11, at 148-49 (quoting Dr. Curtis Boyd: " 'When I walk to work through a hostile crowd



when a medical practice continues in operation, these adverse effects on health care providers ultimately have a negative effect on patient welfare. The district court found that the stress "causes the staff to be distracted and makes it difficult for them to maintain the calm environment necessary for treating patients." *Pro-Choice Network*, 799 F. Supp. at 1428 (Pet. App. A-156); *see also* Erica Bates, *Doctors and Their Spouses Speak: Stress in Medical Practice*, Sociology of Health and Illness, Vol. 4 No. 1, 25, 25 (1982) (the stress the doctor feels may contribute significantly to problems in the doctor-patient relationship); *Feminist Women's Health Center v. Blythe*, 39 Cal. Rptr. 2d 189, 196 (Cal. Ct. App.) (increased anxiety of clinical staff brought on by antiabortion activities increases the risks to patients because the abortion procedure requires a great deal of concentration), *cert. denied*, 116 S. Ct. 514 (1995); John W. Ely, M.D. et al., *Perceived Causes of Family Physicians' Errors*, 40 J. Fam. Prac. 337, 340 Table 2 (1995) (finding in a study of errors of family physicians that 91% attributed errors to various causes of stress).

### D. The Protesters' Conduct Prevents Many Non-Abortion Patients From Obtaining A Wide Panoply Of Basic Health Care Services And Reduces Available Services

As noted above, many of the medical services offered by reproductive health care clinics, including Respondent providers, are for preventive care and non-abortion reproductive health services. *See Specter Hearing* at 2 (statement of Sen. Arlen Specter, Chairman). However, protesters generally practice no selectivity in targeting

shouting "Murderer!" at me, I wonder how many other professionals would choose to provide a service that subjected them to such harassment.' "); *id.* at 149-50 (detailing the experience of a physician who ceased to perform abortions after picketers appeared outside his home with signs that said "Daddy Kills Little Boys and Girls").

patients and often act in ruthless disregard of a patient's medical condition. For example, the Washington State Supreme Court in *Bering v. SHARE*, 721 P.2d 918, 923 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987), noted:

> Respondent-physicians and a nurse testified that picketers interfered with ill patients, placing a pregnant woman possibly suffering from toxemia in acute medical danger, and delaying a patient who was miscarrying a wanted pregnancy and bleeding heavily. This last patient had to force her way through a group of picketers in order to reach her nurse and wheelchair.

*See also Pro-Choice Network*, 799 F. Supp. at 1425 (Pet. App. A-149) (sidewalk counselors target young women and out-of-state vehicles, but they cannot know for sure "whether a woman entering the clinic is even seeking an abortion").

For many minority low-income women and teens, family-planning facilities are their only source of some of their basic health care needs. Not only do these clinics offer a range of family planning services, such as pregnancy tests, contraception, and treatment for sexually transmitted infections; they also provide critical basic preventive health care services, such as screenings for breast and cervical cancer and hypertension and initial prenatal care services. *See, e.g., Specter Hearing* at 57 (statement of Kate Michelman) (health care services at these clinics include "family planning counselling, contraception, breast exams, pap smears, blood screening [and] pre-natal care"). Most of these clinics also conduct related programs, such as teen pregnancy prevention groups, community AIDS education, and outreach to schools. *Id.* at 31-32 (statement of Valerie Koscelnik, Coordinator, CHOICE Hotline); *accord id.* at 45-46 (statement of Pamela Maraldo, President, Planned Parenthood Federation of America); *id.* at 50 (statement of



Judith DeSarno, President, National Family Planning and Reproductive Health Association) (family planning clinics provide services to over 4 million women at over 4,000 sites across the United States). For the majority of women who receive family-planning services in such a clinic, that clinic is their *only* source of health care. *Id.* at 48-49 (statement of Pamela Maraldo).

However, when encountering the intimidating specter of face-to-face picketing and protest activity, many of these women will be deterred from seeking preventive and other necessary health care services. As Ms. Koscelnik indicated during the *Specter Hearing*:

> In far too many instances, [women's] access to these crucial services has been made difficult, or even impossible, because of intimidation, harassment and blockades by radical anti-abortion groups. We have talked to women who were verbally assaulted and threatened as they walk into clinics to fill birth control prescriptions. We have talked to women who have decided not to go to a nearby Planned Parenthood for family planning because they fear harassment and have heard stories about intimidating tactics of protesters. As a result, women's choices in seeking family planning and other health services are limited.

*Id.* at 33 (statement of Valerie Koscelnik).

Furthermore, the intensity of antichoice protest activities has diminished the range of health care services that these clinics are able to offer their patients. Over the past few years, such clinics have spent hundreds of thousands of dollars on security measures to minimize risks to clinic staff and patients—dollars which could have been spent on life-saving services such as pap smears and screening for hypertension and sexually transmitted diseases.[21] The

[21] "Another result of the concerted campaign of antiabortion harassment and violence is, quite expectedly, increased operating costs for facilities." Radford & Shaw, *supra* note 11, at 150.

tradeoff could not be clearer—for the money these clinics have spent on security, they could have offered additional services, opened new clinics, or served thousands of additional women at their current sites. *Specter Hearing* at 34 (statement of Jill June, President, Planned Parenthood of Greater Iowa); *accord id.* at 49 (statement of Pamela Maraldo) (instead of expanding urgently needed services, Planned Parenthood clinics have had to direct valuable health care resources on security measures). Anti-choice protest activity in immediate proximity to these health care clinics is effectively denying low-income women and adolescents access to necessary health care services. *See, e.g.*, David A. Grimes, M.D. et al., *An Epidemic of Antiabortion Violence in the United States*, 165 Am. J. Obstet. & Gynec. 1263, 1267 (1991) (costs of antiabortion epidemic may translate into higher fees for patients).

**E. The Protesters' Conduct Causes A Variety Of Other Risks Of Harm To Patients**

The protesters' conduct causes a variety of other potentially dangerous medical risks. For example, the presence of crowds of protesters in the driveways and streets in front of medical facilities may impede the arrival of emergency vehicles which may suddenly be called upon to assist in a given procedure. In the event of an emergency such as a uterine perforation[22] involving large blood loss, a patient's life could depend upon the prompt arrival of emergency vehicles. These crowds also raise risks of traffic accidents and attendant injuries to patients, physicians, and staff (not to mention to the protesters themselves). *See, e.g., Pro-Choice Network*, 799 F. Supp. at 1424 (Pet. App. A-147) ("The presence of numerous

[22] A uterine perforation, although an infrequent complication, may lead to infection, hemorrhage, and trauma to abdominal contents and increases the risk of abortion-related death due to infection by more than 100% and to hemorrhage by more than 1000%. David A. Grimes, M.D. et al., *supra* note 7, at 2108.



demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the [abortion clinic] facilities and creates a danger to both the occupants of the cars and the demonstrators themselves."); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402, 404 (Cal. 1995) (witness stated that picketing on sidewalk in front of clinic will probably cause traffic accidents), *cert. petition filed*, 64 U.S.L.W. 3287 (U.S. Oct. 10, 1995) (No. 95-576). In addition to traffic accidents, the hostile crowds and chaos created by the protesters also in many instances present physical danger to pedestrians, patients, and others, in and around the entrances to the facilities. *See Pro-Choice Network*, 799 F. Supp. at 1424 (Pet. App. A-147) (the loud and disruptive conduct of the protesters, including their insistence on crowding in driveways and right in front of entrances, "causes stress and sometimes even physical injury to the patients . . . and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care"); *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 672 (Fla. 1993) (per curiam) ("confrontations [with antiabortion protesters] place the patient's health and safety in jeopardy"), *aff'd in part and rev'd in part sub nom. Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

**F. Numerous Courts Around The Country Have Recognized These Harmful Effects Of Antiabortion Conduct Upon Women's Health**

In this case, the district court made uncontroverted findings about the increased health risks caused by the protesters' conduct. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-152 to A-154). However, the trial court in this case was not alone. Indeed, such court findings of antiabortion interference with the provision of safe medical services are legion. *See, e.g., Madsen*, 114 S. Ct. at 2526 (citing the Florida Supreme Court's finding that the "targeted picketing of a hospital or clinic

threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance"); *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 649 (D.C. Cir. 1994) (antiabortion conduct causes risk of medical harm); *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989) (harm from delay and interference with vehicular traffic), *cert. denied*, 495 U.S. 947 (1990); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1346 (3d Cir.) (stress causes additional risks when going under or coming out of general anesthesia), *cert. denied*, 493 U.S. 901 (1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 683 (9th Cir. 1988) (stress and anxiety raise the risk of medical complications and sometimes lead to incomplete or inaccurate health history reports from patients soon after entering the clinic); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (stress and delays often require more advanced and more dangerous medical procedures); *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 613 F. Supp. 656, 666 (E.D. Pa. 1985) (the effect of verbal harassment on women entering and leaving clinics is "to increase the level of anxiety a woman feels and to exacerbate any emotional problems . . . which in turn may have an adverse effect on the medical procedure itself").



## II. EVEN THOUGH THEY PASS THE *MADSEN* TEST, BECAUSE THE PROVISIONS AT ISSUE REGULATE NON-EXPRESSIVE CONDUCT AND ONLY INCIDENTALLY AND MINIMALLY AFFECT SPEECH, AND BECAUSE THEY ARE NECESSARY TO PROTECT THE HEALTH OF WOMEN HELD CAPTIVE BY MEDICAL CIRCUMSTANCE, A MORE LENIENT FIRST AMENDMENT ANALYSIS SHOULD BE APPLIED

Though the provisions of the injunction at issue satisfy the *Madsen* test, *amici* respectfully urge this Court to reconsider whether *Madsen*'s more stringent analysis should in fact be applied to these and similar provisions, and argue that a more lenient test should instead be applied. These provisions were carefully crafted in order to put vitally needed limits on the harmful, non-expressive conduct of the protesters while only minimally infringing on their free speech rights. The district court expressly held that the buffer zone was necessary to ensure access to medical care and to prevent the crowding and invasion of personal space caused by the protesters' conduct. *Pro-Choice Network*, 799 F. Supp. at 1434 (Pet. App. A-170). The court also held that, at the same time, the cease and desist provision was intended to "accommodate fully defendants' First Amendment rights." *Id.*

The crowding of a group of hostile and intimidating protesters in very close, threatening proximity to a medical patient is in itself neither speech nor a method of communicating. *See Madsen*, 114 S. Ct. at 2532 (Stevens, J., dissenting in part) (describing injunction's 300-foot buffer zone as prohibiting "a species of conduct," to wit, accompanying, encircling, surrounding, harassing, threatening, or physically or verbally abusing patients). This conduct simply cannot be fairly described as part and parcel of an attempt to persuade or convince listeners. Instead, it is merely conduct, designed to harass and

intimidate.[23] Moreover, this conduct is not expressive or symbolic of some message, as is the case with such conduct as flag burning, draft card burning, or wearing a black armband to protest war.[24] In this case, the protesters' crowding and intimidation are not in themselves intended to express any ideas; rather, the protesters' ideas are expressed verbally or in signs or images, none of which are prevented by the injunction. The harassing conduct, by contrast, itself expresses no message other than the unprotected terror and threats. *See, e.g., City of Fargo v. Brennan*, 543 N.W.2d 240 (N.D. 1996) (invading zone of personal privacy and angrily waving arms and hands close to patient was not protected speech).[25]

To the extent the provisions do impact upon expressive conduct which is protected by the First Amendment, or, for that matter, upon "pure" speech, they do so only incidentally to the regulation of the harmful conduct, and very minimally. The protesters may continue to espouse their views to the targeted patients; they may speak, or indeed scream, from a distance of 15 feet; they may picket, carry signs, objects and images, sing, chant, pray, and offer pamphlets or other literature; they may engage in expressive body language; and, finally, two people at a

[23] Threats and terror are not protected by the First Amendment. *See, e.g., Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) ("What is a threat must be distinguished from what is constitutionally protected speech.").

[24] *See Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (wearing black armband to protest U.S. military involvement in Vietnam); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning).

[25] This Court has said that not even all conduct which is *intended* to express an idea can be labeled "speech." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); *O'Brien*, 391 U.S. at 376. Therefore, where, as here, the conduct itself is not even *intended* to express an idea but only to harass and intimidate, it is even more clearly nonspeech.



time may approach individuals and communicate with them at the closest range. Indeed, the only impact on speech is that the crowds encircling patients and vehicles and blocking access must, with the exception of two individuals, simply step a small distance away.

The provisions of this injunction thus largely regulate non-expressive conduct, with only incidental limitations on expressive conduct or speech. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). This Court has also held that the government has a "freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989). In both *O'Brien* and *Texas v. Johnson*, the conduct sought to be regulated by the government—draft card or flag burning—while obviously consisting of some nonspeech elements, is also expressive in a very fundamental way. Here, by contrast, the conduct of the protesters sought to be regulated by the injunction provisions at issue, as described above, is hardly expressive in and of itself at all. Under these circumstances, *amici* submit that even in the context of an injunction, this Court's tradition, as exemplified in *O'Brien* and *Texas v. Johnson*, of allowing government a "freer hand" to regulate conduct should result in a more lenient analysis, particularly where the conduct at issue is so largely non-expressive as it is here.

Additionally, a more lenient analysis is called for here because the patients are "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, and are therefore not free to retreat from the protesters without sacrificing their medical well-being. This Court has made clear that the ordinary analysis to be applied when one party's right to speak conflicts with another party's right to be

left alone changes when the latter is a "captive audience." In short, the "captive audience" doctrine requires that when an unwilling listener is unable to escape from a speaker, heightened restrictions on the speaker's expressive activity are appropriate. *See, e.g., Frisby v. Schultz,* 487 U.S. 474, 487-88 (1988). For this reason, then, too, a more lenient First Amendment standard should be applied in this case.

## CONCLUSION

For the above-described reasons, and for the other reasons set forth in the Brief for Respondents, this Court should affirm the decision below.

Respectfully submitted,

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July 1, 1996